[6560-01-M]

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 116]

[FRL 1055-4]

HAZARDOUS SUBSTANCES

Proposed Expansion of Criteria for Designation

AGENCY: Environmental Protection Agency.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The U.S. Environmental Protection Agency ("EPA") is hereby issuing an Advance Notice of Proposed Rulemaking (ANRP) to consider expansion of the criteria for designating hazardous substances. Regulations establishing the initial selection criteria were promulgated on March 13, 1978 (43 FR 10474) pursuant to section 311 of the Clean Water Act (33 U.S.C. 1321). EPA is considering the expansion of the selection criteria to include several new selection factors.

DATE: Comments must be received on or before May 17, 1979.

ADDRESS: Send comments to Criteria and Standards Division (WH-585) U.S. Environmental Protection Agency, 401 M Street, S.W. Washington, D.C. 20460.

FOR FUTHER INFORMATION CONTACT:

Kenneth M. Mackenthun, Director Criteria and Standards Division (WH-585) U.S. Environmental Protection Agency 401 M Street, S.W. Washington, D.C. 20460 (202) 755-0100.

SUPPLEMENTARY INFORMATION: On March 13, 1978, EPA promulgated regulations designating 271 substances as hazardous (43 FR 10474, 40 CFR Part 116). At that same time EPA proposed the designation of 28 additional substances as hazardous (43 FR 10506). Designation was based on their acute toxicity to aquatic animals. However, in that publication the Agency recognized that substances may present an imminent and substantial danger to the public health for reasons other than acute aquatic toxicity. As stated in the preamble to the March 13, regulations (at 10477): "* * * the Agency will seek to expand both the selection criteria and the list of designated hazardous substances in the months ahead. The Agency supports the general comcept that episodic discharges of substances that bioaccumulate to cause subsequent damage to an organism or its predator, or of substances that have been shown to be carcinogenic, mutagenic, or teratogenic are discharges of hazardous substances. The Agency will undertake efforts immediately to revise the selection criteria and to expand the list of hazardous substances to include such materials."

The Agency therefore now gives notice that it is considering expansion of the selection criteria for hazardous substances to include several chronic and long-term effects; these would include such factors as carcinogenicity, mutagenicity, teratogenicity, bioaccumulative effects, synergistic and antagonistic chemical effects, and radioactivity. The Agency is particularly interested in receiving comments on the practicality and necessity of including in future designations such long-term and chronic effects as specified above, as well as the practicality and desirability of any additional factors that may be necessary to identify those substances the discharge of which presents an imminent and substantial danger to the public health or welfare, including, but not limited to fish, shellfish, wildlife, shorelines and beaches.

EPA recognizes that the issues surrounding chronic toxicity do not lend themselves to easy decisions. For instance, the issue of whether and to what degree a substances poses a carcinogenic risk is on the frontier of scientific knowledge, and subject to debate and disagreement. EPA is considering designating substances as hazardous when there is a risk of chronic toxicity to an aquatic organism, to its consumer, or to the consumer of the water which contains the hazardous substance. This position appears appropriate since (1) designation cannot await final resolution of the on-going scientific debate; (2) the Agency has a duty to protect health and the environment, a duty which is preventative and precautionary; and (3) designation does not prohibit manufacture, use, or transportation, but rather prohibits discharges and requires prompt notification and mitigation of discharge. Further, while the 271 substances that were identified in the March 13, 1978, FEDERAL REGISTER as hazardous were designated on the basis of acute toxicity data, the Agency recognizes that a discharge of a hazardous substance with a chronic toxicity hazard may present an imminent and substantial danger to individuals at a time subsequent to the discharge event. Accordingly, the Agency desires information on those factors that may relate discharges of hazardous substances to the later appearance of debilitating chronic effects.

EPA intends to make use of toxicity data gathered in developing water quality criteria and other reguations for toxic pollutants, under section 307 of the Act. Moreover, the Agency may consider the partial or full adoption of criteria, and lists of materials identified thereunder, which have been developed for specific purposes by other agencies or organizations. For example, OSHA has published a list of materials it considers to be human carcinogens. EPA will examine this and other appropriate lists in determining which criteria are appropriate for use in designating substances as hazardous.

REQUEST FOR COMMENTS

Our intent is to consider substances which are carcinogenic, mutagenic, teratogenic, radioactive and which bioaccumulate in animal tissue to cause chronic toxic effects. Suggestions and comments are therefore invited regarding the manner in which selection criteria might be expanded to include such effects, as well as what additional effects or factors should be added to the selection criteria. Toward this end, responses and comments to the following specific questions are requested.

(1) What is the appropriate basis for designating a carcinogen, mutagen or teratogen as a hazardous substance?

(2) How should reportable quantities be defined for carcinogens, mutagens or teratogens?

(3) What bioaccumulation factor (i.e., ratio of a substance's concentration in animal tissue to that in the animal's environment) is appropriate for the designation of a substance as hazardous?

(4) How should reportable quantities be defined for bioaccumulative substances?

(5) How should the radioactive properties of a substance be considered in designating hazardous substances?

(6) How should reportable quantities be determined for radioactive substances?

(7) What mechanism should be used to define reportable quantities of hazardous substances for the phenomena of synergism and antagonism between chemical entities?

(8) What additional hazardous effects need be considered?

(9) What should be the basis for defining substances exhibiting these effects?

(10) How should reportable quantities be defined for these substances?

Comments or suggestions other than those specifically requested will be appreciated.

EPA will carefully consider all timely public comments before developing a notice of proposed rulemaking on amendments to 40 CFR Part 116.

DOUGLAS M. COSTLE.
Administrator.

Dated: February 8, 1979.

[FR Doc. 79-4889 Filed 2-15-79; 8:45 am]

[6560-01-M]

[40 CFR Part 117]

[FRL 1055-5]

HAZARDOUS SUBSTANCES

Determination of Reportable Quantities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rulemaking.

SUMMARY: On March 13, 1978, EPA published regulations under the Clean Water Act regarding the discharge of hazardous substances. (43 FR 10474.) Subsequent litigation and amendments to the Clean Water Act make it necessary to revoke portions of those regulations and propose new regulations. These regulations should be read in conjunction with Part 116—Designation of Hazardous Substances, promulgated March 13, 1978 (43 FR 10474-10488) and amended today in this FEDERAL REGISTER.

DATE: Comments on this proposal will be received until March 19, 1979.

ADDRESS: Send comments to the Criteria and Standards Division (WH-585), Office of Water Planning and Standards, EPA 401 M Street, SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:

Mr. Kenneth M. Mackenthun, (202) 755-0100.

SUPPLEMENTARY INFORMATION:

PURPOSE OF REGULATIONS

On March 13, 1978, the Environmental Protection Agency ("EPA") issued regulations under the Clean Water Act to control the discharge of hazardous substances. (43 FR 10474.) Part 116 in Title 40 designated 271 substances as hazardous; Part 117 determined the removability of each of these substances; Part 118 determined the harmful quantity for each substance; and Part 119 set forth the Agency's determination of units of measurement and rates of penalty for each hazardous substance. On the same day, EPA proposed regulations designating an additional 28 substances as hazardous; these regulations are being promulgated today along with this proposal.

Prior to their effective date, the regulations were challenged in several law suits. One such suit resulted in an Order declaring EPA's determinations of removability (Part 117) and harmful quantities (Part 118) invalid and resulted indirectly in the invalidation of the determinations of units of measurement and rates of penalty (Part 119). The designation of hazardous substances (Part 116) was not affected by the Court's action. See *Manufacturing Chemists Association,, et al. v. Costle, et al.*, 455 F. Supp. 968 (W. D. La., 1978).

On November 2, 1978, Section 311 of the Clean Water Act was amended by Pub. L. 95-576. The amended statute no longer requires the Agency to make determinations of removability or units of measurement for computing penalties. Therefore, Parts 117 and 119 of the March 13, 1978, regulations are being revoked in a separate notice in this FEDERAL REGISTER and will not be repromulgated. The basis for determining reportable quantities, formerly termed "harmful quantities", has been greatly simplified by the recent amendment and, therefore, Part 118 of the March 13, 1978, regulations is also being revoked in this FEDERAL REGISTER. Reportable quantities are being reproposed at this time as a new Part 117.

The new Part 117 consists primarily of the following changes from the old Part 118. The definition section will be amended to include terms required by the recent statutory changes. The term "harmful quantity" has been changed to "reportable quantity". Under the old statute, reporting and other requirements of section 311 were triggered by a discharge of a "harmful quantity" (old 311(b)(3), i.e., a quantity which "will be harmful" at the "times, locations, circumstances and conditions" of discharge (311(b)(4)). The Louisiana District Court invalidated the quantities promulgated in the March 13, 1978, regulations because they were not predictive of actual harm in all instances.

The statutory amendment has changed the quantities which trigger the provisions of section 311 to quantities which "may be harmful", and deleted the reference to specific circumstances and conditions. The legislative history of the amendment makes it clear that in making this change, Congress intended that the determination of reportable quantities would not require an assessment of actual harm in the variety of circumstances in which hazardous substances might be discharged. Rather, Congress intended that the determination be based on the chemical and toxic properties of the substance itself, not the circumstances surrounding its release. The practical effect of this change is that reportable quantities need not be predictive of the actual harm caused by particular discharges in individual circumstances. Instead, reportable quantities need only be a rational generalized prediction of those quantities which may be harmful. Congress contemplated that the Agency would reissue regulations which contained the same "quantities" as those in the March 13 regulations. Thus, the duty to notify authorities of a discharge is not dependent on a showing of actual harm; the degree of harm and other relevant factors are instead examined in assessing civil penalties.

METHOD FOR DETERMINING REPORTABLE QUANTITIES

The designation of hazardous substances to which reportable quantities are assigned was not affected by the 1978 amendment to section 311. This fact was emphasized in the legislative history. This rulemaking designates as reportable quantities the harmful quantities for the 271 hazardous substances that were promulgated (43 FR 10493) and the 28 hazardous substances that were proposed (43 FR 10507) on March 13, 1978.

Toxicological data for individual substances used in determining reportable quantities were derived from the compendium of information fact sheets entitled, *Hazardous Substances Facts Sheets, 1977*, which are available from the Environmental Protection Agency. In addition, other primary sources of data were: "Water Quality Criteria", Federal Pollution Control Administration, 1968, "Water Quality Criteria", EPA, March 1973, and Quality Criteria for Water, EPA 440/9-76-023, July 1976.

The reportable quantity of mixtures or solutions is considered additive based upon the proportions of the individual elements or compounds as follows: For a mixture or solution of substance X substance Y and substance Z, etc., the weight of substance X discharged, is divided by the reportable quantity of pure substance X, and so forth. Next the fractions so derived are added. If the total equals or exceeds one, then the reportable quantity of the mixture or solution has been equaled or exceeded. The discharger must report the total weight of the mixture discharged and the weights, to the best of his knowledge, of the individual hazardous substances constituted in the mixture.

At the time that the original section 311 regulations were promulgated, the Agency responded to a number of comments regarding the method used for determining reportable quantities of both substances and mixtures of solutions. Reference is again made to those comments and replies (43 FR 10474-10488).

Because of an error in data interpretation for one substance and the inadvertent placement of two other substances in incorrect categories, the Agency is changing the hazard category of three substances.

The decomposition products of phosphorus pentasulfide were found to have been entered incorrectly in an earlier fact sheet; this resulted in that substance being incorrectly placed in

hazard Category B. The decomposition products were cited as phosphoric acid and sulfuric acid rather than phosphoric acid and hydrogen sulfide. The 96-hour LC50 toxicity of hydrogen sulfide is 2.0 mg/l, which is within the toxicity range of Category B. The hazard category of phosphorus pentasulfide is therefore changed from C to B.

Resorcinol was placed incorrectly in Category D. Based on its 96-hour LC50 toxicity of 56.6 mg/l it should have been in Category C. The hazard category of resorcinol is therefore changed from D to C.

Trichlorfon was placed incorrectly in Category X because an error was made in entering its acute toxicity in the fact sheet. The 96-hour LC50 of this substance is 51 mg/l but was cited in the fact sheet as 0.051 mg/l. The hazard category of trichlorfon is therefore changed from X to C.

Both the fact sheets and list of hazardous substances have been changed as appropriate to reflect the foregoing.

Applicability

Any owner, operator or person in charge of a vessel or an on-shore or off-shore facility which discharges a hazardous substance in reportable quantity: (1) must immediately notify the Federal Government and is subject to criminal penalties for failure to do so (§ 311(b)(5)); (2) is subject to a civil penalty (§ 311(b)(6)); and (3) is liable for cleanup costs (§ 311(c) and (f)). However, no civil or criminal penalty will be assessed for a discharge beyond the contiguous zone where the owner, operator or person in charge is not otherwise subject to the jurisdiction of the United States.

The general applicability of the regulations being proposed today does not vary a great deal from the coverage of the regulations promulgated on March 13, 1978. As a result of the amendment however, these regulations explain in greater detail when a discharge from a NPDES permitted facility is excluded from section 311 coverage. These exclusions are discussed in greater detail under the following heading "Applicability to Discharges from Facilities with National Pollutant Discharge Elimination System (NPDES) permits".

In addition, a determination regarding one class of discharges that was originally excluded from coverage under the old regulations is being reserved pending further Agency consideration. More information is provided below in "Applicability to Discharges Associated With Dredging and Filling Activities".

As a result of the amendment to section 311 the Agency also feels it necessary to more explicitly address the applicability of these regulations to Publicly Owned Treatment Works (POTWs) and discharges which may enter navigable waters after passing through a sewer system. This is discussed in more detail below under the heading "Applicability to Discharges From Publicly Owned Treatment Works and Their Users".

The Agency received a comment that some substances are discharged for the purpose of extinguishing fire, or providing mandatory tests or services to a fire prevention system. Since none of the substances identified in this regulation was involved, EPA has not provided an exclusion for such discharges. However, the Agency requests comments concerning any discharges, which might be in the public interest and therefore be candidates for a specific exemption from these regulations.

The Administrator of the Environmental Protection Agency may allow the discharge of a substance above the reportable quantity on a case by case basis. This will only occur when significant evidence has been provided to show the Administrator that the discharge will occur in connection with research or demonstration projects relating to the prevention, removal, control or abatement of hazardous substances, and that the results of the study will outweigh the environmental hazard created as a result of the discharge (as provided for in section 104(i) of the Clean Water Act).

Applicability To Discharges From Facilities With National Pollutant Discharge Elimination System (NPDES) Permits

A new section has been added concerning the applicability of these regulations to discharges of hazardous substances from point sources with NPDES permits issued under section 402 of the Clean Water Act.

1. *Legislative history.* Under the old statute, it was unclear whether and to what extent discharges from facilities with NPDES permits were subject to the provisions of section 311. In 1978, Congress acted to clarify this ambiguity. Senator Stafford, a principal sponsor of the amendment to section 311, explained the general nature of the changes, "* * * we are attempting to draw a line between the provisions of the act under sections 301, 304, 402 regulating chronic discharges and 311 dealing with spills. At the extremes it is relatively easy to focus on the difference but it can become complicated. The concept can be summarized by stating that those discharges of pollutants that a reasonable man would conclude are associated with permits, permit conditions, the operation of treatment technology and permit violations would result in 402/309 sanctions; those discharges of pollutants that a reasonable man would conclude are episodic or classical spills not intended or capable of being processed through the permitted treatment system and outfall would result in the application of section 311."

More specifically, Senator Stafford related that "the changes make it clear that discharges, from a point source permitted under section 402, which are associated with manufacturing and treatment, are to be regulated under sections 402 and 309. 'Spill' situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit."

2. *Legislative amendment.* The November 2, 1978 amendment to the Clean Water Act (Pub. L. 95-576) set forth three types of discharges of hazardous substances which will be subject to sections 402 and 309 of the Clean Water Act and excluded from section 311 liability. The three cases excluded are (1) discharges in compliance with a permit under section 402 of the Act, (2) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit, and (3) continuous or anticipated intermittent dischargers from a point source, identified in a permit or a permit application under section 402 of the Act, which are caused by events occurring within the scope of relevant operating or treatment systems. These excluded discharges are exempted from the reporting requirements, civil penalties, and clean-up cost liabilities under section 311 and are instead subject to sections 402 and 309 of the Act.

3. *Summary of Exclusions from Section 311.* Congress developed several concepts for distinguishing between discharges subject to section 311 and those subject to sections 402 and 309. At one end of the spectrum are discharges clearly subject to section 311, such as episodic events or classic spills not intended or capable of being processed through a treatment system. Examples would include on-site industrial spills such as truck or rail accidents, or substantial or large scale failures or ruptures of containers or vessels.

At the other extreme, and clearly subject to sections 402 and 309, are chronic discharges of process wastes from a 402 permitted source which are in compliance with an effluent limitation specifically applicable to the hazardous substance discharged. Such chronic discharges are exempted from section 311 by the first exclusion.

The second and third exclusions are designed to address those discharges falling between these relatively clear extremes. The second exclusion deals with discharges which result from circumstances identified and considered at the time a permit was written and

which are subject to a condition in a permit. Such circumstances could included chronic process waste discharges or tank ruptures, provided that the permit includes conditions to prevent or contain the discharge or eliminate or abate the substance prior to discharge (for example a holding pond to contain the materials discharged from a tank rupture and a system to treat the contained substance over time).

The third exclusion reflects Congress recognition that many existing permits do not contain "conditions" regulating hazardous substances, even for discharges which are clearly process related and chronic rather than spill-type situations. Chronic process related discharges from a permitted source will be exempt from the provisions of section 311 until the permitted source has the opportunity to submit information concerning hazardous substances during the next scheduled permit reissuance or revision.

The final exclusion also exempts anticipated periodic discharges which are caused by events occurring within the scope of the source's operating or treatment system. Such anticipated events which result in continuous or intermittent discharges would be subject to sections 402 and 309.

Each of the exclusions is explained in greater detail below:

4. *Discussion of Exclusion 1.* In some cases, permit effluent limitations representing an appropriate waste treatment technology level exceed the section 311 reportable quantity for a hazardous substance. Thus, a permittee may be in compliance with his permit while discharging a hazardous substance in amounts greater than the reportable quantity. Under these regulations, if a discharge is in compliance with a permit issued under section 402, there is an automatic exclusion from section 311. The permit must contain an effluent limitation specifically applicable to the hazardous substance discharged in order to qualify for this exclusion. Spills, leaks, or other discharges which are not specificially addressed by an effluent limitation in the permit, unless covered by one of the other exclusions, will be subject to section 311, including requirements for Spill Prevention Control and Countermeasure (SPCC) plans (40 CFR Parts 112 and 151).

5. *Discussion of Exclusion 2.* Some discharges of hazardous substances from permitted facilities result from circumstances identified and considered in the issuance of a permit, but which not be subject to specific effluent limitations. The second exclusion addresses these situations, and is available if the source and amount of the substance to be discharged is identified and made a part of the public record, and if the discharge can be eliminated or abated by a treatment system and/or a best mamagement practice. Best management paractices as authorized by section 304(e) of the Act, are operating methods or procedures to prevent or minimize the potential for the discharge of toxic or hazardous substances from processes ancillary to the industrial manufacturing or treatment process.

In order to make discharges "part of the public record," the permit application must specifically identify the substances discharged, the estimated amount of each substance discharged, and the origin or source of the discharge. The Agency recognizes that there may be problems in estimating the amounts of the substances to be discharged due to dissociation of certain compounds and inadequate analytical testing methods. In revising the NPDES application and instructions, these issues will be addressed in more detail; however, it is anticipated that "best estimates" will be acceptable.

Secondly, the NPDES permit must contain best management practices requirements for controlling such discharges and/or effluent limitations specifically limiting the substance discharged. The permittee must demontrate in the permit application that the identified substances will be treated either by on-site auxiliary treatment systems separate and apart from the treatment systems treating the permittee's normal discharge, or by treatment systems treating the permittee's normal discharge which have been specifically designed and operated to treat the types and amounts of these substances. If discharges from events such as industrial spills (e.g., tank ruptures) are to be excluded from section 311, the treatment system must be sufficent to handle the maximum probable occurrence (maximum possible occurrence reasonably contemplated). This additional capacity of the waste treatment system must be specifically documented in the permit application or the permit itself. That is, this exclusion will not apply where the amount of discharge from a particular source (i.e, tank) is identified based on normal leakage, but the actual discharge results form tank rupture and contributes far more than the hazardous substance than was contemplated.

Spills, leaks, or other such discharges which are not contemplated in the design and operation of the waste treatment system or in the development of the NPDES permit are not covered under section 402 but will be subject to section 311, including requirements for SPCC plans (40 CFR Parts 112 and 151). For example, on-site industrial spills such as truck or rail accidents or substantial or large scale failures or ruptures of containers or vessels would be subject to section 311. However, if such on-site spills were processed through a treatment system capable of eliminating or abating such spills, and are subject to a permit condition, such discharges would be regulated under sections 309 and 402. Section 311 will apply where a discharge of a hazardous substance does not pass through a waste treatment system or is not otherwise treated in any way. Additionally, section 311 will apply if materials are discharged from waste treatment systems which have not been demonstrated as capable of eliminating or abating the discharge.

6. *Discussion of Exclusion 3.* An additional exclusion is provided for chronic process related discharges which have not yet been reviewed and made subject to a condition in a permit. Congress recognized that many existing permits do not identify or provide for the regulation of process related and chronic discharges of hazardous substances. The legislative history reveals an intent to provide such permitted sources "a reasonable opportunity to identify the constituents and elements of their effluent, to develop treatment and management procedures, and to apply for a new permit without being liable for section 311 penalties." See Statement of Rep. Breaux, Congressional Record of October 14, 1978 (H13599).

The Agency has determined that the "reasonable opportunity" contemplated by Congress should be interpreted as the time period preceding normal permit revision or reissuance. Accordingly, this exclusion is available until two actions occur: (1) the revised NPDES permit application and accompanying regulation are published and (2) a new or reissued permit is applied for with this new application and a new permit is issued. A new 40 CFR 122.14(a) was proposed on August 21, 1978 (43 FR 37093) regarding the NPDES application and numerous comments have been received. Revisions may be made prior to final promulgation. Permittees are not required to apply for a revised permit at this time in order to obtain an exclusion from section 311. The revised permit application will require identification of hazardous substances, the amount of the substance to be discharged, its origin and source, and documentation that the treatment system and/or best management practices will be sufficient to handle the additional substances. The chronic or process related discharge would be excluded from section 311 if the new or reissued permit fulfilled the requirements of the first or second exclusion.

The third exclusion also provides for discharges which are caused by events occurring within the scope of the relevant operating or treatment systems. The Agency recognizes that even a well operated facility is subject to anticipated periodic upsets which may cause continuous or intermittent discharges, and that such anticipated process related upsets should be subject to sections 402 and 309, not 311. Examples of such situations include system upsets caused by control problems or operator error, system failures or malfunctions; equipment or system start-ups or shut-downs; equipment washes, production schedule changes, noncontact cooling water contamination; or storm water contamination.

A comment has been added to the regulations explaining that certain discharges will not be excluded if they could have been prevented by proper materials handling, or other appropriate actions. Upsets in waste treatment systems and production process, those which might occur even though appropriate operating and maintenance procedures have been followed, should, and will, be excluded from section 311. Additionally, the cooling water and storm water runoff exclusions have been provided because either could result in the discharge of large volumes of water containing trace or low level concentrations of hazardous substances which, after multiplying the flow and concentration values, would result in quantities above the reportable levels contained in section 311. In these cases the exclusion from section 311 should apply. However, where upsets occur from improperly maintained equipment or where chemicals are dumped or discharged to cooling water streams or where large quantities of hazardous materials are spilled and not cleaned up prior to rainfall runoff, resulting discharges will not be excluded from section 311. Finally, "operator error" does not include errors causing classic spills, such as accidental tank ruptures, since such errors are not events occurring within the scope of operation or treatment systems.

7. *Notice.* At the end of this regulation a comment is provided which points out that NP DES regulations require permittees to notify the permitting authority of any discharger in violation of the section 402 permit. The final NPDES regulations will require that the permittee present evidence sufficient to determine if the discharge is covered under section 402 or under section 311. The comment also notes that if at the time of the violation of the section 402 permit, the discharge is uncertain whether the discharge is subject to section 311 or section 402, the permittee should notify the appropriate agency as specified in § 117.21 of these regulations.

APPLICABILITY TO DISCHARGES FROM PUBLICLY OWNED TREATMENT WORKS AND THEIR USERS

Discharges of hazardous substances may reach navigable waters through municipal sewers and sewage treatment plants. Such discharges can result from accidental spills of materials into sewer lines, intentional dumps into manholes and street drains, or through "normal" discharges made by facilities which use the POTWs to dispose of process wastes. Discharges of hazardous substances into municipal sewer systems can cause disastrous results, as illustrated in 1977 by the discharge of a large quantity of hexachlorocyclopentadiene to a POTW in Louisville, Kentucky.

The November 1978 amendment to section 311 did not deal specifically with the discharge of hazardous substances through POTWs to navigable waters. EPA believes that there is a need to clarify jurisdiction between those chronic discharges to POTWs which should be regulated under sections 307(b), (c) and 309 dealing with industrial pretreatment and spills to a POTW, which should be regulated under section 311. However, as the following discussion will point out, there are difficult and complex issues which must be addressed in making this distinction. At this time the Agency is reserving regulation of hazardous substance discharges to POTWs except in certain instances where a discharge to the sewer system is made by a truck, train or other mobile source.

There are two principal questions regarding the applicability of section 311 to discharges which enter POTWs before reaching navigable waters. The first question is how to differentiate between a classic spill and chronic discharges normally made to POTWs by the thousands of facilities which use municipal sewers to dispose of process and other wastes. Congress intended that chronic, process related discharges of hazardous substances from sources with NPDES permits be regulated under section 402/309, not section 311. Similarly EPA believes that it may be appropriate for chronic discharges of hazardous substances to POTWs to be regulated under sections 307(b), (c) and 309 which deal with industrial pretreatment.

In order to provoke public consideration and comment on this first question the Agency is suggesting two possible options for making the differentiation between a classic spill and a chronic discharge to a POTW. We hope that interested persons will suggest other alternatives.

One possibility for resolving the jurisdiction of section 311 versus sections 307 and 309 is to apply the same type of exclusions covering section 402 permitted discharges to sources discharging to navigable waters through POTWs. Thus, in principle, chronic discharges to POTWs could be distinguished from classic spills to POTWs as follows:

1. Chronic discharges of hazardous substances would be regulated under sections 307(b), (c) and 309 if they are associated with the operation of manufacturing processes and related treatment technology, regulated by EPA pretreatment standards or State or local pretreatment requirements and best management practices incorporated in a POTW's NPDES permit as part of an approved pretreatment program.

2. Discharges of hazardous substances that are episodic or classic spills, not intended or capable of being processed though a source's pretreatment system, would be subject to the reporting requirements, penalties and clean-up costs of section 311, regardless of whether categorical pretreatment standards have been established.

In applying these principles to discharges to a sewer system, EPA could utilize the principles of § 117.12 of these regulations which applies to direct discharges covered by NPDES permits.

However, a serious problem exists in applying Congress' concepts for excluding 402 permitted sources, to discharges to POTWs. In the case of direct discharges, the NPDES permit process allows EPA or an NPDES State to make a case-by-case examination of each source applying for a permit. This is an important step in differentiating between discharges subject to section 402 and 309 and those subject to section 311. It is clear that Congress intended that the NPDES permit be the mechanism through whih EPA or the NPDES State establish discharges eligible for an exclusion, hazardous substances discharged, the manufacturing and treatment processes covered by any exclusion, and enforceable requirements to eliminate or abate discharges of hazardous substances. The problem, of course, is that the Act does not provide for permits for discharges to POTWs. Consequently, there is no written record which EPA and the regulated party can reference to determine whether certain discharges are excluded from regulation under section 311.

It is possible that mechanisms other than permits could be used to retain the essence of Congress' intent in determining exclusions from section 311 for discharges to POTWs. This could be done by making all discharges of hazardous substances (in reportable quantities) to POTWs subject to regulation under section 311 unless a

chronic discharge of the substance was specifically regulated by a national pretreatment standard promulgated by EPA under section 307(b) and (c) of the Act or by a pretreatment requirement set by a State or local authority and incorporated into the POTW's section 402 permit as part of a pretreatment program approved in accordance with EPA's *General Pretreatment Regulations* (40 CFR Part 403).

In order to allow exclusion of chronic discharges not specifically regulated in pretreatment standards or requirements, the Agency could also allow exclusions for any other chronic discharge of a hazardous substance identified, reviewed and made a part of the reports submitted by a source under 40 CFR 403.12 of EPA's *General Pretreatment Regulations*. The *General Pretreatment Regulations* require sources subject to EPA's categorical pretreatment standards to submit a report to EPA or the NPDES State within 180 days of promulgation of the standard. These reports are required to establish whether the source is in compliance with pretreatment standards, and in cases of noncompliance, to establish a schedule for achieving compliance. Since these reports are already required, the source could, as an option, provide the same information which will be submitted by permitted direct discharges under § 117.12 of these proposed regulations. The required information would include the description of the substance and the amount of the substance to be discharged, its origin and source, and documentation that the treatment system or enforceable State or local best management practices will be sufficient to handle the identified substances. Where the appropriate information is submitted, discharges could unless disapproved, be exempt from regulation under section 311 in the same way discharges from NPDES permitted facilities will be exempt.

The above approach would exclude discharges of hazardous substances other than those regulated in the pretreatment standards from section 311, but would still limit the exclusion to dischargers subject to national pretreatment standards since only those sources covered by a national standard submit compliance reports. Sources not regulated by pretreatment standards, but who chronically discharge hazardous substances to sewer systems, would still be required to report these discharges and be liable under section 311. In some instances daily reporting could be required. This reporting burden could be resolved by allowing any source of chronic discharges to POTWs to submit to EPA the information described above and thus avoid daily reporting of chronic discharges of hazardous substances in excess of reportable quantities. However, such an approach would preclude any regulation and mitigation of the environmental impact of such discharges until pretreatment standards were developed for each designated substance and each source. Due to the complexity of developing technology-based pretreatment standards, effective environmental protection could be delayed for many years.

The second option for distinguishing between chronic discharges and spills to sewer systems is based partly on EPA's recognition that, while POTWs are in most cases designed to treat only domestic-type waste, they may achieve varying degrees of removal of other pollutants as well. Congress recognized the removal provided by municipal treatment in Section 307(b) of the Act, which specifically provides for modification of technology-based national pretreatment standards to account for pollutant removal achieved by POTWs.

As in the first option, all chronic discharges of hazardous substances (in reportable quantities) to POTWs would be excluded from regulation under section 311 if the chronic discharge of the substance was specifically regulated by a national pretreatment standard or by a State or local standard incorporated into the POTW's permit as part of an approved pretreatment program.

The major difference between this option and the first one is in how it deals with sources and substances not specifically regulated by pretreatment standards. Rather than attempting to make a case-by-case distinction between chronic discharges and spills for each source, the applicability to section 311 to discharges to sewers could be based on quantities which reflect treatment provided by POTWs prior to release to navigable waters.

To be more specific, industrial sources would be required to notify the Government if the quantity of the hazardous substance released to the sewer would exceed the reportable quantity established by this regulation after municipal treatment when the POTW discharges it to navigable waters. To determine whether a quantity released to sewers would be subject to section 311, EPA would multiply the reportable quantities established in this regulation by a factor reflecting the removal typically provided by a POTW with secondary biological treatment. Since data on the removal of all hazardous substances will not be available for some time and the Act provides for listing a substance as hazardous if it "may be harmful", the factor reflecting POTW removals would for most substances be based on assumed removal rates. In some instances reliable data on removals achieved by secondary biological treatment systems are available and would be used. As additional information on removals becomes available, estimated removals would be adjusted to reflect the new data. EPA would be conservative in estimating removal rates.

In this option, if a source chronically discharges less of a hazardous substance than the reportable quantity multiplied by the nationwide factor reflecting POTW removals, then it would not be subject to the provisions of section 311. Chronic discharges covered by pretreatment standards would also be excluded from section 311. Spills to sewers, including discharges in excess of the reportable quantity reflecting POTW removal and discharges to POTWs with less than secondary treatment technology, would be subject to section 311 reporting, penalties, and clean-up costs.

The Agency feels that, while there may be some difficult technical problems associated with this option, it offers a number of advantages over a system of case-by-case distinction between spills and chronic discharges. By consulting the list of quantities reflecting POTW removals, EPA and the source could quickly determine whether or not a discharge to the sewers was to be reported as a spill. This option is also consistent with Congress' desire not to require treatment redundant of that provided by a POTW. Finally EPA believes that it is simpler and less burdensome to administer since it does not require dischargers to submit information, and more importantly does not require the review of complex information by EPA or the Coast Guard, before responding to a spill.

Due to the complexity of the issues involved in regulating discharges of hazardous substances to POTWs, the potential impact of any decision on the thousands of facilities which regularly discharge hazardous substances to POTWs, and the uncertainty about the best way to distinguish chronic discharges from spills under section 311, EPA is reserving regulation of such discharges to POTWs at this time. This will give the Agency and the public an opportunity to further consider the issues and problems involved. After consideration of public comment on these initial ideas, EPA will formally propose for comment a separate section of these regulations to address discharges to POTWs.

However, there is one case where today's proposed regulations apply to discharges of designated hazardous substances to POTWs. Discharges will be subject to section 311 where a discharge of a reportable quantity of a designated hazardous substance is made to a sewer system from a truck, train, or other mobile source which has not contracted or otherwise re-

ceived written permission to discharge the designated substances into the POTW. For example, discharges to a sewer system by a waste hauler who contracts to discharge specified hazardous substances to the sewer, would not be required to report under section 311 and these regulations. However, an illegal discharge, or "midnight dump", as well as any accidental discharge by a mobile source into a POTW's sewer system would be reportable and subject to all applicable provisions of the regulations being proposed today.

The second principal question involves determining what should be the role and responsibility of the POTW when a section 311 substance is discharged to its sewer system.

As described above, the regulations being proposed today make discharges from a truck, train or other mobile source subject to section 311 reporting, penalties and costs of clean-up unless the mobile source had a contract or formal permission from the POTW to discharge specified hazardous substances to the sewer. Today's regulation reserves coverage of all other discharges to POTWs for further consideration. The following discussion of a POTW's responsibility under today's regulation will, therefore, only be relevant where the discharge to the POTW was from a mobile source. It should be noted however, that EPA is considering similar provisions regarding POTW responsibility for other discharges of hazardous substances to sewer systems. EPA solicits public comment on both the applicable provisions of today's regulation and the advisability of extending these provisions to indirect discharges for which regulation is being reserved.

The Agency believes that the November 1978, amendment excluding from section 311 certain discharges by sources with NPDES permits, applies directly to some discharges of hazardous substances a permitted POTW may make to navigable waters. In particular, the exclusion is appropriate for chronic discharges of hazardous substances such as chlorine, which are used by the POTW in the operation of its treatment system. Of course, classic spills by the POTW of hazardous substances should be subject to section 311, just as they would be from any other source. The problem is in determining the applicability of the exclusion provisions and defining the role and responsibility of a POTW when it discharges hazardous substances as a result of influent received from an indirect discharger. Application of Congress' intent is less clear in this case.

All of Congress' exclusions for permitted discharges presuppose that the permitted source knows of the presence of the hazardous substance and has made or will make provisons to treat the particular substance prior to its discharge. However, unless notified of a discharge to its system by a mobile source, the POTW cannot be expected to know of the presence of a hazardous substance in its system. Since EPA lacks authority under section 311 to require mobile sources (or other sources) who spill to POTWs, to notify the POTW, these regulations only require that the Coast Guard be notified. Therefore, under the proposed regulations, a mobile source is solely responsible for section 311 discharges which go to a POTW. Sources which spill hazardous substances to POTWs are, of course, urged to report the discharge to the POTW at the same time they report it to the Coast Guard so that the POTW can protect its treatment system and take any available mitigating actions. The Agency is investigating authority to require such dischargers to notify the POTW under sections 307(b) and 402(d)(8) of the Act.

In some cases a POTW may become aware that a spill to its system has occurred. This could occur where the POTW is notified by the source of the spill or where it becomes aware of an incident, as through news broadcasts. The Agency believes that if the POTW becomes aware that a spill from a mobile source has occurred, it should make the fastest and, under the circumstances, best assessment it can, concerning the most effective action to take. The goals should be twofold. First, to protect itself from serious damage or upset, and second, to mitigate the damage to the environment to the maximum extent possible. Measures a POTW might take may include partial or complete treatment of the hazardous substance or a diversion or bypass of flows containing the substance.

EPA will notify the NPDES regulations to require that if the POTW believes that a reportable quantity of the substance has been discharged or will be discharged to navigable waters, it shall immediately notify the Coast Guard of the discharge so that appropriate mitigation can begin at once and downstream users of the water can be warned. If, on the other hand, the POTW is certain it can prevent such a discharge, the NPDES regulations will require that it report to the Coast Guard that the spill will be contained or treated in its treatment system.

If the POTW is aware of a spill to its system from a mobile source, it will be responsible for implementing any applicable best management practices under section 304(e) in its 402 permit to control release of the hazardous substance to the environment. EPA has a proposed NPDES regulation, 40 CFR 151, which will require POTWs to develop best management practices. These best management practices include spill prevention control and counter-measures plans required by section 311(j). POTWs will be required to plan for such discharges and develop best management practices in advance for dealing with reported spills. Once best management practices are incorporated into the POTW's permit, failure to implement applicable practices upon learning of a spill to its sewers could subject the POTW to an enforcement action under section 309.

Some actions (e.g. bypasses) taken by the POTW to protect the integrity of the treatment plant and/or mitigate environmental damage may cause the POTW to violate its own NPDES permit limits. Until POTWs are next reissued 402 permits which identify such situations or best management practices are developed and incorporated into POTW permits specifying such situations and mitigating actions to be taken, POTWs acting in good faith to mitigate the effects of a spill will not be held responsible for such violations.

Applicability To Discharges Associated With Dredging and Filling Activities

Sections 311 and 404 of the Clean Water Act contain complementary and specific authority to reach the Act's objective of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Each section must be implemented to ensure that the specific activities regulated by each section are conducted in an environmentally acceptable manner.

Section 404(a) of the Act provides that the Corps of Engineers "may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Section 404(b)(1) requires the application of guidelines developed by the Administrator in conjunction with the Corps of Engineers in the specification of such disposal sites. Section 404(g) allows States with programs approved by the Administrator to issue permits for the discharge of dredged or fill material into waters which are not navigable-in-fact.

The Agency recognizes that dredge and fill activities must be conducted in an environmentally acceptable manner. However, the Agency has not yet determined the best method for ensuring the attainment of this goal, and whether section 311 is an appropriate section to apply to such activities. The Agency is currently re-evaluating and revising the 404(b)(1) guidelines, and is carefully examining the relationshiup of such guidelines to the section 311 program. Until this review

is completed, the applicability of section 311 provisions to dredge and fill activities will be reserved.

The Agency is considering a number of options regarding sections 311 and 404. Discharges of dredged or fill material which are conducted in compliance with a section 404 permit may be excluded from the provisions of section 311. This approach would rely upon the section 404(b)(1) guidelines to prevent the introduction into water of a hazardous substance in such quantity as may be harmful. Under the section 404 guidelines, the testing of dredged or fill material to determine the appropriateness of a discharge where a probability of environmental damage exists would be required.

Another option, that of application of the provisions of section 311 to activities permitted under section 404, may raise concerns. All dredged and fill materials, often exceeding several tons, would have to be tested for all hazardous substances to ensure compliance with section 311. Already this would involve 299 substances, and the list is expected to be expanded considerably in the future. Because of the vast amounts of material involved in dredge and fill operations, even minute concentrations of hazardous substances could be technically interpreted as exceeding the reportable quantities of the new part 117, even though such quantities might be bound to solids and not available or hazardous in fact.

The Agency solicits public comments on the best means of coordinating the relationship of sections 311 and 404. In particular, the Agency is interested in comments on the feasibility of testing, the types of tests that would be appropriate, the relative costs of such tests, suggestions on how discharges of dredged or fill material could be categorized to be accommodated by the section 311 regulations, and suggestions on other possible approaches for screening discharges of dredged or fill material in relation to the activities which are the subject of these regulations.

Section 117.33, "Applicability to Discharges of Dredged or fill Material", is therefore reserved pending further consideration.

Procedure for Giving Notice of Discharge

Procedures for giving notice of discharges above the reportable quantities are explained in 33 CFR 153.203, "Procedure for the Notice of Discharge". A copy of that regulation appears as Attachment I to this preamble.

Penalties

The amendment to section 311 of the Clean Water Act creates two methods for panalizing dischargers of oil or hazardous substances. The first, which already existed as section 311(b)(6) of the statute prior to the amendment of November 2, 1978, provides for the assessment by the United States Coast Guard of a civil penalty not to exceed $5,000 for the discharge of oil or a designated hazardous substance [section 311(b)(6)(A)]. The second option, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal district court for penalties not to exceed $50,000 per discharge unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed $250,000 [section 311(b)(6)(B)]. Factors to be considered by EPA in determining whether a higher penalty is warranted are described in this regulation. Prompt mitigation of a discharge is encouraged by making mitigation an important consideration in establishing the size of the penalty. This is particularly significant in discharges of hazardous substances which are capable of actual removal. A discharger of a designated hazardous substance can be penalized under section 311(b)(6)(A) or section 311(b)(6)(B), but not both. The EPA and the United States Coast Guard are developing an agreement regarding those cases which shall be referred to EPA for consideration of the higher penalty. In those cases where EPA determines to bring action for a civil penalty, administrative penalty assessment under section 311(b)(6)(A), which would otherwise be initiated by the United States Coast Guard, shall be withheld.

The legislative history supporting the November 2, 1978 amendment does not demonstrate an intent to change the penalty structure under section 311 for oil spill situations. Therefore, EPA does not intend to apply the 311(b)(6)(B) penalty to discharges of oil.

With regard to section 402 NPDES permitted facilities, civil penalties will not be assessed under both section 311 and section 309 for the same discharge.

It should also be noted that any costs of removal incurred in connection with continuous or anticipated intermittent discharges from a point source identified in a permit or permit application under section 402, or discharges from permitted point sources which are caused by events occurring within the scope of relevant operating or treatment systems, will be recoverable from the owner, operator or person in charge of the source of the discharge in an action brought under section 309(b) of the Clean Water Act.

Deferral of Regulations as They Apply to Discharges from Common Carriers

On Friday, August 25, 1978, EPA published notice in the Federal Register that it would defer implementing these regulations as they apply to discharges from railroad rolling stock. This was done because it had been pointed out that common carriers such as railroads must by law transport all shipments tendered to them in accordance with applicable legal requirements. Currently, there is no legal requirement that shippers identify their cargoes as containing substances designated as hazardous under section 311. Thus, railroad and trucking personnel may have no way of knowing whether a substance they are handling or carrying is subject to section 311's requirements. EPA is currently working with the Department of Transportation to expedite the development of appropriate legal requirments for shipper identification. These requirements are expected to be proposed within the next thirty days. When such requirements are promulgated, EPA will publish notice in the Federal Register announcing the effective date of the section 311 regulations as they apply to common carriers.

Economic Impact Statement

These regulations are intended to encourage a high standard of care in handling hazardous substances by prohibiting the discharge of such substances in reportable quantities. These regulations do not require the construction of pollution control equipment or the adoption of spill prevention plans, nor do they prohibit the manufacture, use or transport of any substance. Thus, compliance with these regulations will not result in any direct costs to the regulated parties.

However, two types of expenses may be incurred because of violations of these regulations: civil penalties and clean-up costs. Since economic impacts are generally based on compliance costs, not costs resulting from failure to comply, these two factors are not considered as direct impacts. This is particularly appropriate since in the absence of mandatory reporting of discharges of hazardous substances, there are little data on discharge events (i.e. number and size of discharges, types of materials spilled, resulting penalties, and associated clean-up costs). It is therefore very difficult to estimate the frequency of violations or the resulting costs.

As a result of the amendment to the statute, the potential penalties to be assessed under the proposed regula-

tions are considerably simplified and reduced from those originally promulgated. The former penalty structure was more complex and severe. The maximum penalty for a discharge from a land-based facility was set at $500,000 while a discharge from a vessel could result in a $5 million penalty. The penalty structure has now been both simplified and moderated (the maximum penalty for any discharge is now set at $50,000 unless it is the result of willful negligence or willful misconduct, where the penalty can reach $250,000). Therefore, the potential amounts of civil penalties will be substantially less than projected in the March 13, 1978 promulgation (43 FR 10479).

Evaluation Plan

Under the amendment to section 311, the Agency is required to "conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances * * *. The Administrator shall include in such a study (1) limits of liability, (2) liability of third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92-500 should be enacted." (Pub. L. 95-576).

This study will provide the Agency with a more complete picture of the effectiveness of these regulations and possible economic impacts, and will allow the Agency to evaluate any procedural difficulties encountered in implementing the regulations. The Agency is required to complete this study by May, 1980. Plans are now being completed for the conduct of this study and the Agency will solicit assistance from interested parties in the performance of this study.

Comments

The changes made in the regulations today deal primarily with the applicability section and the penalties for violation of this regulation. No change has been made in the list of substances or the reportable quantities except for the three substances addressed earlier in this preamble. Moreover, the methods of determining reportable quantities have not been changed. The Agency believes that in addressing the comments received on the original proposed regulations (43 FR 10490), it has sufficiently considered and responded to most issues concerning the sections of this regulation which are being reproposed at this time. All of the substantive changes from the regulations promulgated on March 13, 1978 are explained in this preamble. The changes involve the applicability of section 311. The Agency has determined that a comment period of thirty (30) days will be necessary to address the new issues in this proposed rulemaking.

Douglas M. Costle,
Administrator.

February 8, 1979.

Attachment I

§ 153.203 *Procedure for the notice of discharge.*

(a) Before January 1, 1977, any person in charge of a vessel or an onshore or offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from that vessel or facility in violation of section 311(b)(3) of the Act, immediately notify by telephone, radio telecommunication, or a similar means of rapid communication, one of the following persons:

(1) Duty Officer, National Response Center, U.S. Coast Guard, 400 Seventh Street, SW, Washington, D.C. 20590, toll free telephone number 800-424-8802.

(2) The government official predesignated in the applicable Regional Contingency Plan as the On-Scene Coordinator for the geographic area in which the discharge occurs.

Note.—Regional Contingency Plans are available at Coast Guard District Offices and Environmental Protection Agency (EPA) Regional Offices, as indicated in Table 2. Coast Guard District Office and EPA Regional Office addresses are listed in Table 1.

(3) Commanding Officer or Officer-in-Charge of any Coast Guard unit in the vicinity of the discharge, or in the case of a discharge into the Panama Canal Zone, the Marine Traffic Control in Cristobal or Balboa.

(4) Commander of the Coast Guard district in which the discharge occurs.

Note.—Coast Guard Districts and corresponding States may be found in Part 3 of this Chapter.

(b) After December 31, 1976, any person in charge of a vessel or an onshore or offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from that vessel or facility in violation of section 311(b)(3) of the Act, immediately notify by telephone, radio telecommunication, or a similar means of rapid communication the official designated in paragraph (a)(1) of this section, except as prescribed in paragraph (c) and (d) of this section.

(c) If after December 31, 1979, to give notice as prescribed in paragraph (b) of this section is impractical, notice may be given to the officials listed in paragraphs (a)(2) through (a)(4) of this section in order of priority.

(d) After December 31, 1976 any person in charge of a vessel or an onshore or offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance occurring in Alaska or Hawaii from that vessel or facility in violation of section 311(b)(3) of the Act, immediately notify by telephone, radio telecommunications, or a similar means of rapid communications any

of the officials listed in paragraphs (a)(2) through (a)(4) of this section.

It is proposed to add Part 117 as follows:

Part 117—Determination of Reportable Quantities For Hazardous Substances

Subpart A—General Provisions

Sec.
117.1 Definitions.
117.2 Abbreviations.
117.3 Determination of reportable quantities.

Subpart B—Applicability

117.11 General applicability.
117.12 Applicability to discharges from facilities with NPDES permits.
117.13 Applicability to discharges from publicly owned treatment works and their users.
117.14 Applicability associated with dredging and filling activities.
117.15 Demonstration projects.

Subpart C—Notice of Discharge of a Reportable Quantity

117.21 Notice.
117.22 Penalties.
117.23 Liabilities for removal.

AUTHORITY.—Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), (the Act) and Executive Order 11735.

Subpart A—General Provisions

§ 117.1 Definitions.

As used in this part, all terms shall have the meanings stated in 40 CFR Part 116.

"Reportable quantities" means quantities that may be harmful as set forth in § 117.3, the discharge of which requires notice as set forth in § 117.21.

"Administrator" means the Administrator of the Environmental Protection Agency (EPA).

"Mobile source" means any vehicle, rolling stock, or other means of transportation which contains or carries a reportable quantity of a hazardous substance.

"Public record" means the NPDES permit application or the NPDES permit itself.

"National Pretreatment Standard" or "Pretreatment Standard" means any regulation containing pollutant discharge limits promulgated by the EPA in accordance with section 307(b) and (c) of the Act, which applies to Industrial users of a publicly owned treatment works. It further means any State or local pretreatment requirement applicable to a discharge and which is incorporated into a permit issued to a publicly owned treatment works under section 402 of the Act.

"Publicly Owned Treatment Works" or "POTW" means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any sewers that convey wastewater to such a treatment works, but does not include pipes sewers or other conveyances not connected to a facility providing treatment. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

"Mixture" means any combination of two or more elements and/or compounds in solid, liquid or gaseous form except where such substances have undergone a chemical reaction so as to become inseparable by physical means.

"Remove" or "removal" refers to removal of the oil or hazardous substances from the water and shoreline or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

§ 117.2 Abbreviations.

NPDES equals National Pollutant Discharge Elimination System

RQ equals reportable quantity.

§ 117.3 Determination of reportable quantities.

The quantity listed with each substance in Table 117.3 is determined to be the reportable quantity for that substance. The reportable quantity of mixtures or solutions are considered additive based upon the proportions of the individual elements or compounds as follows: For a mixture or solution of substance X, substance Y, and substance Z, etc., the weight of substance X discharged is divided by the reportable quantity of pure subtance X, and so forth. Next, the fractions so derived are added. If the total equals or exceeds one then there reportable quantity of the mixture or solution has been equaled or exceeded.

TABLE 117.3 REPORTABLE QUANTITIES OF HAZARDOUS SUBSTANCES

NOTE.—The first number under the column headed "RQ" is the reportable quantity in pounds. The number in parentheses is the metric equivalent in kilograms. For convenience, the table contains a column headed "Category" which lists the code letters "X", "A", "B", "C" and "D" associated with reportable quantities of 1, 10, 100, 1,000 and 5,000 pounds respectively.

Material	Category	RQ in pounds (kilograms)
Acetaldehyde	C	1,000 (454).
Acetic acid	C	1,000 (454).
Acetic anhydride	C	1,000 (454).
Acetone cyanohydrin	A	10 (4.54).
Acetyl bromide	D	5,000 (2,270).
Acetyl chloride	D	5,000 (2,270).
Acrolein	X	1 (0.454).
Acrylonitrile	B	100 (45.4).
Adipic acid	D	5,000 (2,270).
Aldrin	X	1 (0.454).
Allyl alcohol	B	100 (45.4).
Allyl chloride	C	1,000 (454).
Aluminum sulfate	D	5,000 (2,270).
Ammonia	B	100 (45.4).
Ammonium acetate	D	5,000 (2,270).
Ammonium benzoate	D	5,000 (2,270).
Ammonium bicarbonate	D	5,000 (2,270).
Ammonium bichromate	C	1,000 (454).
Ammonium bifluoride	D	5,000 (2,270).
Ammonium bisulfite	D	5,000 (2,270).
Ammonium carbamate	D	5,000 (2,270).
Ammonium carbonate	D	5,000 (2,270).
Ammonium chloride	D	5,000 (2,270).
Ammonium chromate	C	1,000 (454).
Ammonium citrate	D	5,000 (2,270).
Ammonium fluoborate	D	5,000 (2,270).
Ammonium fluoride	D	5,000 (2,270).
Ammonium hydroxide	C	1,000 (454).
Ammonium oxalate	D	5,000 (2,270).
Ammonium silicofluoride	C	1,000 (454).
Ammonium sulfamate	D	5,000 (2,270).
Ammonium sulfide	D	5,000 (2,270).
Ammonium sulfite	D	5,000 (2,270).
Ammonium tartrate	D	5,000 (2,270).
Ammonium thiocyanate	D	5,000 (2,270).
Ammonium thiosulfate	D	5,000 (2,270).
Amyl acetate	C	1,000 (454).
Aniline	C	1,000 (454).
Antimony pentachloride	C	1,000 (454).
Antimony potassium tartrate	C	1,000 (454).
Antimony tribromide	C	1,000 (454).
Antimony trichloride	C	1,000 (454).
Antimony trifluoride	C	1,000 (454).
Antimony trioxide	D	5,000 (2,270).
Arsenic disulfide	D	5,000 (2,270).
Arsenic pentoxide	D	5,000 (2,270).
Arsenic trichloride	D	5,000 (2,270).
Arsenic trioxide	D	5,000 (2,270).
Arsenic trisulfide	D	5,000 (2,270).
Barium cyanide	A	10 (4.54).
Benzene	C	1,000 (454).
Benzoic acid	D	5,000 (2,270).
Benzonitrile	C	1,000 (454).
Benzoyl chloride	C	1,000 (454).
Benzyl chloride	B	100 (45.4).
Beryllium chloride	D	5,000 (2,270).
Beryllium fluoride	D	5,000 (2,270).
Beryllium nitrate	D	5,000 (2,270).
Butyl acetate	D	5,000 (2,270).
n-Butyl phthalate	B	100 (45.4).
Butylamine	C	1,000 (454).
Butyric acid	D	5,000 (2,270).
Cadmium acetate	B	100 (45.4).
Cadmium bormide	B	100 (45.4).
Cadmium chloride	B	100 (45.4).
Calcium arsenate	C	1,000 (454).
Calcium arsenite	C	1,000 (454).
Calcium carbide	D	5,000 (2,270).
Calcium chromate	C	1,000 (454).
Calcium cyanide	A	10 (4.54).
Calcium dodecylbenzenesulfonate	C	1,000 (454).
Calcium hydroxide	D	5,000 (2,270).
Calcium hypochlorite	A	10 (4.54).
Calcium oxide	D	5,000 (2,270).
Captan	A	10 (4.54).
Carbaryl	B	100 (45.4).
Carbofuran	A	10 (4.54).
Carbon disulfide	D	5,000 (2,270).
Carbon tetrachloride	D	5,000 (2,270).
Chlordane	X	1 (0.454).
Chlorine	A	10 (4.54).
Chlorobenzene	B	100 (45.4).
Chloroform	D	5,000 (2,270).
Chlorpyrifos	X	1 (0.454).
Chlorosulfonic acid	C	1,000 (454).
Chromic acetate	C	1,000 (454).
Chromic acid	C	1,000 (454).
Chromic sulfate	C	1,000 (454).
Chromous chloride	C	1,000 (454).
Cobaltous bromide	C	1,000 (454).
Cobaltous formate	C	1,000 (454).

Material	Category	RQ in pounds (kilograms)
Cobaltous sulfamate	C	1,000 (454).
Coumaphos	A	10 (4.54).
Cresol	C	1,000 (454).
Crotonaldehyde	B	100 (45.4).
Cupric acetate	B	100 (45.4).
Cupric acetoarsenite	B	100 (45.4).
Cupric chloride	A	10 (4.54).
Cupric nitrate	B	100 (45.4).
Cupric oxalate	B	100 (45.4).
Cupric sulfate	A	10 (4.54).
Cupric sulfate ammoniated	B	100 (45.4).
Cupric tartrate	B	100 (45.4).
Cyanogen chloride	A	10 (4.54).
Cyclohexane	C	1,000 (454).
2,4-D Acid	B	100 (45.4).
2,4-D Esters	B	100 (45.4).
DDT	X	1 (0.454).
Diazinon	X	1 (0.454).
Dicamba	C	1,000 (454).
Dichlobenil	C	1,000 (454).
Dichlone	X	1 (0.454).
Dichlorobenzene	B	100 (45.4).
Dichloropropane	D	5,000 (2,270).
Dichloropropene	D	5,000 (2,270).
Dichloropropene-Dichloropropane Mixture	D	5,000 (2,270).
2,2-Dichloropropionic acid	D	5,000 (2,270).
Dichlorvos	A	10 (4.54).
Dieldrin	X	1 (0.454).
Diethylamine	C	1,000 (454).
Dimethylamine	C	1,000 (454).
Dinitrobenzene	C	1,000 (454).
Dinitrophenol	C	1,000 (454).
Dinitrotoluene	C	1,000 (454).
Diquat	C	1,000 (454).
Disulfoton	X	1 (0.454).
Diuron	B	100 (45.4).
Dodecylbenzenesulfonic acid	C	1,000 (454).
Endosulfan	X	1 (0.454).
Endrin	X	1 (0.454).
Epichlorohydrin	C	1,000 (454).
Ethion	A	10 (4.54).
Ethylbenzene	C	1,000 (454).
Ethylenediamine	C	1,000 (454).
Ethylene dibromide	C	1,000 (454).
Ethylene dichloride	D	5,000 (2,270).
EDTA	D	5,000 (2,270).
Ferric ammonium citrate	C	1,000 (454).
Ferric ammonium oxalate	C	1,000 (454).
Ferric chloride	C	1,000 (454).
Ferric fluoride	B	100 (45.4).
Ferric nitrate	C	1,000 (454).
Ferric sulfate	C	1,000 (454).
Ferrous ammonium sulfate	C	1,000 (454).
Ferrous chloride	B	100 (45.4).
Ferrous sulfate	C	1,000 (454).
Formaldehyde	C	1,000 (454).
Formic acid	D	5,000 (2,270).
Fumaric acid	D	5,000 (2,270).
Furfural	C	1,000 (454).
Guthion	X	1 (0.454).
Heptachlor	X	1 (0.454).
Hexachlorocyclopentadiene	X	1 (0.454).
Hydrochloric acid	D	5,000 (2,270).
Hydrofluoric acid	D	5,000 (2,270).
Hydrogen cyanide	A	10 (4.54).
Hydrogen sulfide	B	100 (45.4).
Isoprene	C	1,000 (454).
Isopropanolamine dodecylbenzenesulfonate	C	1,000 (454).
Kelthane	D	5,000 (2,270).
Kepone	X	1 (0.454).
Lead acetate	D	5,000 (2,270).
Lead arsenate	D	5,000 (2,270).
Lead chloride	D	5,000 (2,270).
Lead fluoborate	D	5,000 (2,270).
Lead fluoride	C	1,000 (454).
Lead iodide	D	5,000 (2,270).
Lead nitrate	D	5,000 (2,270).
Lead stearate	D	5,000 (2,270).
Lead sulfate	D	5,000 (2,270).
Lead sulfide	D	5,000 (2,270).
Lead thiocyanate	D	5,000 (2,270).
Lindane	X	1 (0.454).
Lithium chromate	C	1,000 (454).
Malathion	A	10 (4.54).
Maleic acid	D	5,000 (2,270).
Maleic anhydride	D	5,000 (2,270).
Mercaptodimethur	B	100 (45.4).
Mercuric cyanide	X	1 (0.454).
Mercuric nitrate	A	10 (4.54).
Mercuric sulfate	A	10 (4.54).
Mercuric thiocyanate	A	10 (4.54).

Material	Category	RQ in pounds (kilograms)
Mercurous nitrate	A	10 (4.54).
Methoxychlor	X	1 (0.454).
Methyl mercaptan	B	100 (45.4).
Methyl methacrylate	D	5,000 (2,270).
Methyl parathion	B	100 (45.4).
Mevinphos	X	1 (0.454).
Mexacarbate	C	1,000 (454).
Monoethylamine	C	1,000 (454).
Monomethylamine	C	1,000 (454).
Naled	A	10 (4.54).
Naphthalene	D	5,000 (2,270).
Naphthenic acid	B	100 (45.4).
Nickel ammonium sulfate	D	5,000 (2,270).
Nickel chloride	D	5,000 (2,270).
Nickel hydroxide	C	1,000 (454).
Nickel nitrate	D	5,000 (2,270).
Nickel sulfate	D	5,000 (2,270).
Nitric acid	C	1,000 (454).
Nitrobenzene	C	1,000 (454).
Nitrogen dioxide	C	1,000 (454).
Nitrophenol	C	1,000 (454).
Nitrotoluene	C	1,000 (454).
Paraformaldehyde	C	1,000 (454).
Parathion	X	1 (0.454).
Pentachlorophenol	A	10 (4.54).
Phenol	C	1,000 (454).
Phosgene	D	5,000 (2,270).
Phosphoric acid	D	5,000 (2,270).
Phosphorus	X	1 (0.454).
Phosphorus oxychloride	D	5,000 (2,270).
Phosphorus pentasulfide	B	100 (45.4).
Phosphorus trichloride	D	5,000 (2,270).
Polychlorinated biphenyls	A	10 (4.54).
Potassium arsenate	C	1,000 (454).
Potassium arsenite	C	1,000 (454).
Potassium bichromate	C	1,000 (454).
Potassium chromate	C	1,000 (454).
Potassium cyanide	A	10 (4.54).
Potassium hydroxide	C	1,000 (454).
Potassium permanganate	B	100 (45.4).
Propargite	A	10 (4.54).
Propionic acid	D	5,000 (2,270).
Propionic anhydride	D	5,000 (2,270).
Propylene oxide	D	5,000 (2,270).
Pyrethrins	C	1,000 (454).
Quinoline	C	1,000 (454).
Resorcinol	C	1,000 (454).
Selenium oxide	C	1,000 (454).
Silver nitrate	X	1 (0.454).
Sodium	C	1,000 (454).
Sodium arsenate	C	1,000 (454).
Sodium arsenite	C	1,000 (454).
Sodium bichromate	C	1,000 (454).
Sodium bifluoride	D	5,000 (2,270).
Sodium bisulfite	D	5,000 (2,270).
Sodium chromate	C	1,000 (454).
Sodium cyanide	A	10 (4.54).
Sodium dodecylbenzenesulfonate	C	1,000 (454).
Sodium fluoride	D	5,000 (2,270).
Sodium hydrosulfide	D	5,000 (2,270).
Sodium hydroxide	C	1,000 (454).
Sodium hypochlorite	B	100 (45.4).
Sodium methylate	C	1,000 (454).
Sodium nitrite	B	100 (45.4).
Sodium phosphate, dibasic	D	5,000 (2,270).
Sodium phosphate, tribasic	D	5,000 (2,270).
Sodium selenite	C	1,000 (454).
Strontium chromate	C	1,000 (454).
Strychnine	A	10 (4.54).
Styrene	C	1,000 (454).
Sulfuric acid	C	1,000 (454).
Sulfur monochloride	C	1,000 (454).
2,4,5-T acid	B	100 (45.4).
2,4,5-T amines	B	100 (45.4).
2,4,5-T esters	B	100 (45.4).
2,4,5-T salts	B	100 (45.4).
2,4,5-TP acid	B	100 (45.4).
2,4,5-TP acid esters	B	100 (45.4).
TDE	X	1 (0.454).
Tetraethyl lead	B	100 (45.4).
Tetraethyl pyrophosphate	B	100 (45.4).
Thallium sulfate	C	1,000 (454).
Toluene	C	1,000 (454).
Toxaphene	X	1 (0.454).
Trichlorfon	C	1,000 (454).
Trichloroethylene	C	1,000 (454).
Trichlorophenol	A	10 (4.54).
Triethanolamine dodecylbenzenesulfonate	C	1,000 (454).
Triethylamine	D	5,000 (2,270).
Trimethylamine	C	1,000 (454).
Uranyl acetate	D	5,000 (2,270).

Material	Category	RQ in pounds (kilograms)
Uranyl nitrate	D	5,000 (2,270).
Vanadium pentoxide	C	1,000 (454).
Vanadyl sulfate	C	1,000 (454).
Vinyl acetate	C	1,000 (454).
Vinylidene chloride	D	5,000 (2,270).
Xylene	C	1,000 (454).
Xylenol	C	1,000 (454).
Zinc acetate	C	1,000 (454).
Zinc ammonium chloride	D	5,000 (2,270).
Zinc borate	C	1,000 (454).
Zinc bromide	D	5,000 (2,270).
Zinc carbonate	C	1,000 (454).
Zinc chloride	D	5,000 (2,270).
Zinc cyanide	A	10 (4.54).
Zinc fluoride	C	1,000 (454).
Zinc formate	C	1,000 (454).
Zinc hydrosulfite	C	1,000 (454).
Zinc nitrate	D	5,000 (2,270).
Zinc phenolsulfonate	D	5,000 (2,270).
Zinc phosphide	C	1,000 (454).
Zinc silicofluoride	D	5,000 (2,270).
Zinc sulfate	C	1,000 (454).
Zirconium nitrate	D	5,000 (2,270).
Zirconium potassium fluoride	D	5,000 (2,270).
Zirconium sulfate	D	5,000 (2,270).
Zirconium tetrachloride	D	5,000 (2,270).

Subpart B—Applicability

§ 117.11 General applicability.

This regulation sets forth a determination of the reportable quantity for each substance designated as hazardous in 40 CFR Part 116. The regulation applies to quantities of designated substances equal to or greater than those set forth above, when discharged to waters and shorelines as provided in section 311(b)(3) of the Act, except to the extent that the owner or operator can show such discharges are made.

(a) In compliance with a permit issued under the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.),

(b) In compliance with approved water treatment plant operations as specified by local or State regulations pertaining to safe drinking water,

(c) Pursuant to the label directions for application of a pesticide product registered under 40 CFR Part 162 (Federl Register, Vol. 40, No. 129, Part II, pp. 28242-28226, July 3, 1975) by authority of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972 (Pub. L. 92-516, 86 Stat. 751; 7 U.S.C. 136 et. seq.), and further amended by the Federal Pesticide Act of 1978 (Pub. L. 95-396, 92 Stat. 819),

(d) In compliance with the regulations issued under section 3004 of the Resource Conservation and Recovery Act, 90 Stat. 2795; 42 U.S.C. 6901,

(e) In compliance with instructions of the On-Scene Coordinator pursuant to 40 CFR 1510 (the National Oil and Hazardous Substance Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances) or in accordance with applicable removal regulations as required by Section 311(j)(1)(A),

(f) In compliance with a permit issued under § 165.7 of Title 14 of the State of California Administrative Code,

(g) From a properly functioning inert gas system when used to provide inert gas to the cargo tanks of a vessel,

(h) From a permitted source and are excluded by § 117.12 of this regulation, or

(i) To a POTW and are specificaly excluded or reserved in § 117.13.

§ 117.12 Applicability to discharges from facilities with NPDES permits.

(a) This regulation does not apply to:

(1) Discharges in compliance with a permit under section 402 of this Act;

(2) Discharges resulting from circumstances identified, reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such permit;

(3) Continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of this Act, which are caused by events occurring within the scope of the relevant operating or treatment systems; or

(4) Discharges from a POTW of substances received as influent at the treatment works.

(b) *Definitions.* (1) A discharge is "in compliance with a permit issued under section 402 of this Act" if the permit contains an effluent limitation specifically applicable to the substance discharged and the discharge is in compliance with the limitation.

(2) A discharge results "from circumstances identified, reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit," whether or not the discharge is in compliance with the permit, if:

(i) The permit application specifically identifies:

(A) The substance and the amount of the substance to be discharged;

(B) The origin and source of the discharge; and

(C) The treatment to be provided for the discharge either by:

(*1*) An on-site treatment system separate and apart from any treatment system treating the permittee's normal discharge or

(*2*) A treatment system treating the permittee's normal discharge which is designed to treat the substance in the amount identified as to be discharged or

(*3*) A best management practice designed to prevent or contain the discharge and, if the discharge will occur, treatment to eliminate or abate the substance that could be discharged; and

(ii) The permit contains:

(A) A best management practice designed to prevent or contain the discharge, and, if the discharge will occur, treatment to eliminate or abate the substance that could be discharged or

(B) An effluent limitation specifically limiting the substance discharged and a requirement that the discharge be treated either by:

(*1*) An on-site treatment system separate and apart from any treatment system treating the permittee's normal discharge or

(*2*) A treatment system treating the permittee's normal discharge which is designed to treat the substance in the amounts identified as being or likely to be discharged

and the best management practice or treatment system is in existence and use; and

(3) A discharge is a "continuous or anticipated intermittent discharge from a point source, identified in a permit or permit application under section 402 of this Act, and caused by events occurring within the scope of the relevant operating or treatment system," whether or not such discharges are in compliance with the permit, if:

(i) An application for a permit for the discharge from the point source

has been submitted and has not been denied or revoked; and

(ii) The discharge is caused by:

(A) An upset or failure of a treatment system resulting from a control problem, operator error, system failure or

(B) Contamination by noncontact cooling water or storm water; or

(C) Upset or failure in the process producing the discharge the treatment system is designed to treat resulting from a control problem, operator error, system failure or malfunction; or an equipment or system startup or shutdown, equipment wash or production schedule change; or

[*Comment:* Discharges will *not* be excluded under section (3)(ii) if they could have been prevented by proper maintenance, proper materials handling, or other such action. Examples where these exclusions may *not* apply include chemical spills to noncontact cooling water, spills entrained by storm water runoff that could have been cleaned up prior to the rainfall event, and system upsets or failure where equipment has not been adequately maintained.]

(iii) The discharge is a continuous or anticipated intermittent discharge of process waste, and

(A) is discharged from a point source which holds a permit issued before the effective date of 40CFR 122.14(a) or

(B) the substance discharged is designated as hazardous after the date of any permit revised following promulgation of 40 CFR 122.14(a), but only until the next revision of the permit.

[*Comment:* The NPDES standard permit form presently requires the permittee to notify the permit issuing authority of a permit violation within five days of such violation (EPA Form 3560-2, Part II, Condition A 2). The proposed revisions to the NPDES regulations require the permittee to notify the permit issuing authority of a permit violation within 24 hours of such violation, (proposed 40 CFR 122.14(h), 43 FR 37093 (August 21, 1978)). When the NPDES regulations are finalized, this section will also require the written violations report submitted by the permittee to distinguish between section 311 and section 402 violations. If a permittee is uncertain whether a discharge is subject to section 402 or section 311, he should immediately provide notice under section 311 and § 117.21 of these regulations to avoid possible criminal liability.]

§ 117.13 Applicability to discharges from publicly owned treatment works and their users.

(a) [Reserved]

(b) These regulations apply to all discharges of reportable quantities to a POTW, the source of which is a mobile source except where such source has contracted with, or otherwise received written permission for the owners or operators of the POTW to discharge that quantity, and the mobile source can show that prior to accepting the substance from an industrial discharger, the substance had been treated to comply with any effluent limitation under section 301, 302 or 306 or pretreatment standard under section 307 applicable to that facility.

117.14 Applicability to discharges associated with dredging and filling activities. [Reserved]

§ 117.15 Demonstration projects.

Notwithstanding any other provision of this Part, the Administrator of the Environmental Protection Agency may, on a case-by-case basis, allow the discharge of designated hazardous substances in connection with research or demonstration projects relating to the prevention, control, or abatement of hazardous substance pollution. No such discharge will be allowed unless a significant showing has been made that the expected environmental benefit from such a discharge outweighs the hazard associated with the discharge.

Subpart C—Notice of Discharge of a Reportable Quantity

§ 117.21 Notice.

Any person in charge of a vessel or an onshore or an offshore facility shall, as soon as he has knowledge of any discharge of a designated hazardous substance from such vessel or facility in quantities equal to or exceeding in any 24-hour period the reportable quantity determined by this Part, immediately notify the appropriate agency of the United States Government of such discharge. Notice shall be given in accordance with such procedures as the Secretary of Transportation has set forth in 33 CFR 153.203. This provision applies to all discharges not specifically excluded or reserved by another section of these regulations.

§ 117.22 Penalties.

(a) Any person in charge of a vessel or an onshore or offshore facility who fails to notify immediately the United States Government of discharges of hazardous substances designated in 40 CFR Part 116 equal to or exceeding in any 24-hour period those quantities which may be harmful as set forth in this Part (except in the case of a discharge beyond the contiguous zone, where the person in charge of a vessel is not otherwise subject to the jurisdiction of the United States) shall be subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both, pursuant to section 311(b)(5).

(b) The owner, operator or person in charge of a vessel or onshore or offshore facility from which is discharged a hazardous substance designated in 40 CFR Part 116 in a quantity equal to or exceeding in any 24-hour period, the reportable quantity established in this Part, (except in the case of a discharge beyond the contiguous zone, where the person in charge of a vessel is not otherwise subject to the jurisdiction of the United States) shall be assessed a civil penalty of up to $5,000 per violation under section 311(b)(6)(A). Alternatively, upon a determination by the Administrator, a civil action will be commenced under section 311(b)(6)(B) to impose a penalty not to exceed $50,000 per spill of hazardous substance unless such discharge is the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, in which case the penalty shall not exceed $250,000.

[NOTE: The Administrator will take into account the gravity of the offense and the standard of care manifest by the owner, operator, or person in charge in determining whether a civil action will be commenced under section 311(b)(6)(B). The gravity of the offense will be interpreted to include the size of the discharge, the degree of danger or harm to the public health, safety, or the environment, including consideration of toxicity, degradability, and dispersal charateristics of the substance, pervious spill history, and violation of any spill prevention regulations. Particular emphasis will be placed on the standard of care and the extent of mitigation efforts manifest by the owner, operator, or person in charge.]

§ 117.23 Liabilities for removal.

In any case where a substance designated as hazardous in 40 CFR Part 116 is discharged from any vessel or onshore or offshore facility in a quantity equal to or exceeding the reportable quantity determined by this Part, the owner, operator or person in charge will be liable, pursuant to sections 311(f) and (g) of the Act, to the United States Government for the actual costs incurred in the removal of such substance, subject only to the defenses and monetary limitations enumerated in sections 311(f) and (g) of the Act. The Administrator may act to mitigate the damage to the public health or welfare caused by a discharge and the cost of such mitigation shall be considered a cost incurred under section 311(c) for the removal of that substance by the United States Government. In any case where a discharge is excluded from this regulation by § 117.12(b)(3) of this regulation the owner, operator or person in charge shall be liable for any costs incurred in the removal of such discharge in an action brought under section 309(b) of the Act.

[FR Doc. 79-4888 Filed 2-15-79; 8:45 am]

federal register

FRIDAY, FEBRUARY 16, 1979

PART V

ENVIRONMENTAL PROTECTION AGENCY

■

PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT AND THE CLEAN WATER ACT

Final Regulations

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

[FRL 1041-1]

PART 25—PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Final Regulations

AGENCY: Environmental Protection Agency.

ACTION: Rule.

SUMMARY: These regulations are intended to encourage, provide for, and assist public participation under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act. They replace existing regulations for public participation in water programs and interim final regulations for public participation in solid waste management. The regulations include general provisions which require open processes of government and efforts to promote public awareness in the course of making decisions in programs and activities under the three Acts. Also included are requirements which apply to specific public participation mechanisms, such as public hearings and advisory groups. These regulations do not require the use of the specific mechanisms. The mechanisms must be used only if they are required in program regulations. Public participation regulations for one covered program are being promulgated simultaneously with these regulations. They are regulations governing public participation in the Municipal Wastewater Treatment Facility Construction Grants Program under the Clean Water Act. These regulations appear elsewhere in this issue of the FEDERAL REGISTER.

DATES: These regulations are effective on February 16, 1979, except as otherwise specified in § 25.2.

ADDRESSES: Comments submitted on these regulations may be inspected at the Public Information Reference Unit, EPA Headquarters, Room 2922, Waterside Mall, 401 M Street, SW., Washington, D.C. between 8:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT:

Lee Daneker, Office of Water and Waste Management (WH 556), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, telephone 202-755-7638.

SUPPLEMENTARY INFORMATION: EPA has received a significant volume of thoughtful criticism of its performance in implementing its legal public participation mandates and its more general responsibility to involve the public in significant governmental decisions. This criticism has been stimulated in part by the desire of citizens to be active in shaping government programs which affect their lives and also by the growing need for governmental units at all levels to participate in the programs of other governmental entities. Government decisionmakers have become increasingly aware of the capability of citizens to make constructive use of opportunities for involvement. This new awareness has been accompanied by increased practical experience in using approaches and techniques to facilitate citizen involvement.

In response to the circumstances discussed briefly above, the EPA perceived a new opportunity to better define public participation requirements, to eliminate unnecessary requirements, and to assure consistency of requirements under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act. This effort is intended to foster improved public imvolvement in governmental decisions by clarifying the rights and responsibilities of potential participants and those responsible for administering public participation programs. This will lead to better decisions, more satisfactory opportunities for citizens to encourage economy in government, and greater public confidence in government because decisions have been made with participation by interested citizens. It will also encourage better relations among units of government which often find themselves in a dual role of participating in programs of other agencies as well as administering participation programs of their own.

EPA developed a set of concept papers for improved public participation requirements under the three Acts and made them public in early March 1978. These concept papers were circulated to approximately 7,000 interested parties including more than 3,000 who were mailed draft Construction Grants Program regulations dated March 3, 1978. The Agency held two public meetings to receive comment on the concept papers, met with EPA staff in all ten EPA regions, received numerous verbal comments telephoned to the Agency, and met with several outside interest groups including representatives of several States and municipalities and with representatives of the Association of State and Interstate Water Pollution Control Agencies.

As a result of these outreach activities, the EPA received more than 300 written comments on the concept papers. After considering all comments, EPA revised the concept papers, and published them in the FEDERAL REGISTER on August 7, 1978, as proposed regulations. The Agency provided 60 days for public comment, held a public meeting to receive comments in San Francisco on September 21, 1978, held a public hearing on the proposed regulations in Washington, D.C. on September 26, and provided 56 hours of toll-free telephone time to facilitate the submission of comments from individuals from all parts of the Nation.

EPA instituted the toll-free line for submitting comments as an alternative to holding hearings or meetings on the proposed regulations in other parts of the country. Many commenters expressed strong approval of the toll-free line, especially those who lacked the resources to travel readily and therefore would have been unlikely to attend hearings in other cities. Some criticism of our failure to hold hearings throughout the country was also expressed.

EPA received more than 300 comments by October 6, 1978, the date on which the official record closed. Approximately 125 of these were received over the toll-free line. Fifteen witnesses testified at the September 26 public hearing. Additional comments received after October resulted in a total of more than 500 comments. A review of the comments by affiliation indicates that the public involvement effort succeeded in stimulating a balanced and diverse record. Major segments of the public which were well represented include States, substate agencies and units of government, economic interests, planners, engineers, private citizens, public interest groups, and environmental groups.

All comments, including those received shortly after October 6, were reviewed and considered in developing the final regulation.

Virtually all commenters supported the intent of the EPA effort and the objectives of the regulations. In general, those who commented primarily from the perspective of former, current or prospective participants in EPA programs were supportive of the proposed regulations but critical of the Agency for relaxing the regulations relative to the March concept papers. In many cases these commenters called for a return to the more stringent approach of the concept papers, for more specificity and additional requirements, and for limitations on discretion and flexibility. Many of these commenters cited problems which they had experienced with the public participation performance of EPA and units of government at other levels. They pointed out that the establishment of clear, firm re-

quirements would be one of the most effective actions which EPA could take to generate public interest and participation. In contrast, many, although not all, of those commenting as representatives of implementing agencies expressed concern that the regulations were too rigid and detailed and would offer too many opportunities to stop projects or to take legal action on minor procedural issues. These commenters called for a further relaxation of requirements, elimination of detail, and provision of additional flexibility. In many instances, these commenters recognized the flexibility which had been introduced relative to the March concept papers, but indicated that the changes were not sufficient. Some commenters called for EPA to eliminate all requirements and instead to limit itself to setting objectives ("performance standards") which could be fulfilled through a variety of mechanisms. In support of performance standards, many elected officials or their representatives commented that the more general performance standard approach would maintain and protect the authority of State and local officials from Federal encroachment.

EPA agrees that the regulations should provide maximum flexibility and discretion to implementing agencies and should not infringe improperly upon the authority of other governmental units. The Agency is also sensitive to those who accurately pointed out the strong positive relationship between firm requirements, credible public participation efforts, and the willingness of the public to participate. In revising the proposed Part 25, EPA has attempted to provide flexibility wherever it would not interfere with public involvement. In a limited number of instances where it appeared necessary and justified, EPA has opted for more specific requirements. In general, the final Part 25 moves in the direction of fewer specific requirements than the proposed version. The following is a list of changes in the final regulation which have provided increased flexibility and discretion relative to the proposed Part 25, existing Part 105 (Public Participation in Water Programs) and interim final Part 249 (Public Participation in Solid Waste Management):

1. EPA non-policy rulemaking was covered in proposed Part 25. It is specifically excluded from final Part 25.

2. Activities covered by Part 105 but excluded, except as discretionary elements, from the public participation requirements of final Part 25 are as follows: 40 CFR Part 33 (Subagreements), Part 39 (Loan Guarantees for Construction of Treatment Works), Part 40 (Research and Development Grants), Part 45 (Training Grants and Manpower Forecasting) and Part 46 (Fellowships).

3. Final Part 25 eliminates the annual State report on public participation required by Part 105.3.

4. Part 105.3 (a) and (c) require that informational materials be mailed directly to persons on each agency's mailing list. Part 249.4 (b) and (c) required periodic dissemination of informational materials. Final Part 25.4(b) requires only that notice of the availability of materials be mailed, rather than the materials themselves or summaries of the materials.

5. Part 105.4(d), Part 249.4(e) and proposed Part 25.3(c) required notices and informational materials to be sent to the entire agency mailing list. Final Part 25.4(b)(5) permits segmenting of the list and mailing notices of events (or of availability of materials) only to appropriate portions of the list.

6. The requirement of Part 105.4(b) and Part 249.4(d), for each agency to have "standing arrangements" for consultation with the public, is deleted from final Part 25; although Part 25 continues to require consultation on significant decisions.

7. The requirement of Part 105.4(e), that copying facilities be available at information depositories, is changed to a recommendation in final Part 25.4(b)(3). Part 249.4 (f) and (i) required that information on the availability of copying facilities at convenient locations and at reasonable cost to the public be available. This requirement is deleted.

8. The recommendation in proposed Part 25.3(b), that agencies target informational materials to specific segments of the public, is changed in final Part 25.4(b)(2) to a recommendation to *consider* preparing targeted materials.

9. Proposed Part 25.3(b) required that "relevant" documents be placed in information depositories. Part 249(f) required that agencies shall provide, either directly or through others, in convenient locations, one or more public collections of Solid and Hazardous Waste Management reports pertinent to the geographic area. Final Part 25.4(b)(3) limits the documents that must be placed in depositories to those relating to significant decisions.

10. The requirement of Part 105.7(d), that public meeting notices be mailed as soon as the meeting is scheduled, is deleted from the final Part 25.

11. The requirement of Part 105.7(d) and Part 249.7(d), that public hearing notices be mailed as soon as the hearing is scheduled, is deleted from the final Part 25.

12. The requirement of Part 105.7(g) and Part 249.7(g) to publish the hearing agenda in the public hearing notice is deleted from the final Part 25.

13. Part 105.7(c) requires that cases of doubt over whether to hold a public hearing be resolved in favor of holding a hearing. Part 249.7(c) requires that a hearing be held if there is any public interest. These requirements are deleted from the final Part 25.

14. Final Part 25.5(b) gives Regional Administrators the authority to waive public hearing notice requirements in emergency situations.

15. Final Part 25.5(c) permits the agency holding a public hearing to prepare a tape recording or other complete record of the hearing instead of a transcript and make it available to the public.

16. The requirement for financial disclosure by advisory group members, proposed Part 25.3(d)(iii)(D), is deleted from the final Part 25.

17. Final Part 25.7(c) provides new flexibility in advisory group membership requirements and permits EPA to waive those requirements for grantees which cannot meet the requirements after making active, good faith efforts to do so. Proposed Part 25 included a less flexible membership requirement and made no provision for a waiver.

18. Final Part 25.10 permits modification of the public participation work plan with the agreement of the Regional Administrator. No provision for modifying the work plan was included in the proposed Part 25.

19. Public Participation Summaries are deleted from the final Part 25 in favor of Responsiveness Summaries (see final Part 25.11).

20. Final Part 25.7(e) provides an increased State and local agency role in advisory group training. No State and local rule was provided in proposed Part 25.

EPA believes the balance which the final regulations achieve between flexibility and specificity recognizes the public's expressed desire for firm requirements yet responds effectively to the legitimate concern of potential implementing agencies that they have the freedom to tailor their programs to specific local, regional or Statewide needs.

Summary of Response to Public Comment

The following sections respond to other major points raised in comments by the public made in writing, over the toll-free line, at the public meeting, and at the public hearing.

1. *Application of proposed Part 25 to all EPA programs.* In the preamble to the proposed regulations, EPA questioned whether they should be applied to all programs administered by EPA. Public response to this was strongly in favor of consistent requirements for the entire Agency. Comments indicat-

ed that inconsistent requirements were a significant factor impeding public involvement in Agency programs. EPA is responding to this by the development of an Agency-wide policy on public participation. This policy will require each program to develop regulations or guidance implementing it. The Agency will monitor program performance under this approach to determine whether it is successful in achieving consistent public participation requirements and opportunities for those seeking to become involved in Agency programs.

2. *Requirements will not guarantee a successful public participation effort.* Many commenters stated that requirements were not sufficient to assure effective public involvement. Some commenting agencies further stated that, since requirements would not in themselves be effective, EPA appeared to be depending too heavily upon them. EPA recognizes that requirements, while necessary, are only one part of making public participation successful. Equally important is the conduct of effective programs of public education as well as the attitude, energy, and creativity with which implementing agencies, including EPA, undertake their public participation responsibilities. Another significant factor is the availability of agency staff knowledgeable about public participation techniques. EPA is taking action to meet this last need by developing and carrying out a training program in public participation to enhance the capabilities of EPA, State and local agency staff.

3. *Relationship of Part 25 to program regulations and guidance.* Many commenters indicated their belief that Part 25 established new requirements that advisory groups be formed and public hearings held. This is not the case. As explained in the new introductory section 25.1, Part 25 establishes general requirements for open processes of government through public information, public notification, and public consultation prior to significant decisions, but it does not mandate the use of specific public participation mechanisms, such as advisory groups, meetings, and hearings. These are required only when mandated in program regulations or specified at the discretion of a responsible official. The final section of this preamble includes a listing of other EPA regulations which have been or will be revised to implement the requirements of Part 25.

The role of program regulations, or EPA policy guidance memoranda, in implementing the Part 25 regulations is to emphasize the applicability of the general Part 25 public information, notification and consultation requirements to significant decisions in the affected programs. In some instances program regulations or guidance will also identify significant decisions or processes where specific requirements will apply (e.g., holding a public meeting or hearing). The use of additional specific mechanisms at these decision points or at other decisions not referenced by EPA requirements is discretionary with the implementing agency. If public participation is carried out under EPA grant, all reasonable costs will be grant eligible if identified in a public participation work plan or otherwise approved by EPA.

Other EPA "guidance" will be in the form of handbooks or manuals for implementing agency staff or for the participating public. These are intended to assist the public and implementing agency staff by providing suggestions for ways to meet requirements, samples or models of work which meets requirements, and examples of successful public participation efforts.

4. *Application of Part 25 to programs under the Safe Drinking Water Act.* The public participation regulations are intended to encourage public involvement in the decision-making process in programs under the Resource Conservation and Recovery Act, the Clean Water Act, and the Safe Drinking Water Act. However, not all sections are relevant to every program. For instance, several States' comments reflected a concern that the advisory group requirements in the proposed regulations would require the establishment of such committees in programs under the Safe Drinking Water Act. This concern is unfounded. The advisory group section applies only where committees are required in program regulations. No requirement for such committees appears in the regulations implementing the Safe Drinking Water Act; nor is such a requirement contemplated.

The regulations allow flexibility and discretion in implementation within each covered program. The guidance and regulation which will be developed by the drinking water program, and other programs, will reflect options which are compatible with each program's capabilities and the opportunities within the program for meaningful public participation.

5. *Application to approved State programs.* Each of the three Acts designates certain programs which can be administered by a State, instead of by EPA, if the State program meets criteria established in the law and EPA regulations. The proposed Part 25 indicated that EPA was required to provide for public participation in the process of making a determination to approve such State programs. It also provided that, after approval, the State would be responsible for meeting the public participation requirements which had been the responsibility of EPA. Like the proposed regulations, final Part 25 requires EPA to provide for public involvement in the process of making its determination regarding approval of all State programs. However, the final Part 25 indicates that public participation requirements for the NPDES Permit Program, the State Hazardous Waste Program, the Dredge and Fill Permit Program, and the Underground Injection Control Program are contained in the Consolidated Permit Program regulations (40 CFR Part 123). These regulations embody the requirements of Part 25. Public participation requirements for the Construction Grants Program are found in 40 CFR Part 35, Subparts E and F. States which undertake Construction Grants Program functions after approval by EPA are responsible for meeting applicable public participation requirements of these regulations, including requirements of Part 25 which are incorporated by reference.

One State expressed concern that the regulations would apply to all State activities which were administered under the annual State program administration grants authorized under section 106 of the Clean Water Act, including State-initiated activities which are not required by the Clean Water Act, which are not delegated to the State by EPA, and which are not funded by EPA grant. While public participation in purely State activities of this type may be desirable, such participation is at the discretion of the State and would not be required by these regulations.

6. *Public participation objectives.* Virtually all commenters supported the public participation objectives of the proposed Part 25; however, several commenters felt that promoting support for environmental laws was not a proper role for administrative agencies. EPA agrees and has changed this objective to read, "to encourage public involvement in implementing environmental laws."

7. *Public information requirements.* Most commenters recognized and supported the need for public information as a prerequisite to effective public participation; however, many stated that the proposed requirements were not clear and, in some cases, were potentially burdensome. In response to comments of this nature, EPA has made the following modifications to the public information provisions of the regulations: permitted segmenting mailing lists by geographic or interest area and specified that only the appropriate portion of the list need receive agency mailings; specified that only summaries and notices of availability need be sent to the list (or appropriate segment) rather than entire docu-

ments; specified that documents available in depositories need include only those relating to significant or controversial issues; clarified the term "reasonable costs" of copying charges by reference to prevailing commercial rates.

8. *Public hearing notice requirements.* Comment on the proposed public hearing notice requirements was sharply divided between State and local agencies which generally opposed any increase in the 30 days required by existing regulations and potential participants (including private citizens, public interest groups, and economic interests) which supported the 45 day notice requirement included in the proposed regulations. The record of citizen comment indicates clearly that 30 days has often been inadequate to allow notices to be circulated, documents obtained and reviewed, and testimony prepared. Accordingly, the final regulations retain 45 days as the standard public hearing notice requirement; however, EPA has responded to the comment by State and local agencies by including a provision to reduce the notice requirement, to not less than 30 days, where EPA finds that the longer notice is not needed to encourage public participation in a particular hearing.

9. *Emphasis on advisory groups.* Many commenters expressed concern that the regulations placed excessive emphasis on the use of advisory groups. We do not believe this concern is justified. Part 25 does not require the formation of any advisory groups. Such groups must be formed only when required by program regulations. Advisory groups have been a requirement in the Water Quality Management (section 208) program for several years. New program regulations for the Construction Grants Program will require advisory groups, but in only 30 percent of facilities plans. No advisory group requirements are contemplated for the Clean Lakes Program, Underground Injection Control Program, Public Water Supply Program, State Hazardous Waste Program, or the NPDES Permit Program. The question of whether they would be required under State Solid Waste Management Program grants is still open. Given this record, we do not agree that the Agency places excessive emphasis on the use of advisory groups.

10. *Role of advisory groups.* The proposed regulations stated that advisory groups were intended to provide advice and recommendations to elected decisionmakers and to encourage an interchange among the interests represented on the group. Some commenters felt that the final decision-making role of elected officials should be emphasized more strongly. We agree, and have added language to the advisory group section further emphasizing this point.

11. *Advisory group membership.* Comments from most State and local agencies and public officials indicated that the advisory group membership requirements of proposed Part 25 provided them too little flexibility in constituting such groups. They expressed particular objection to the requirement that a majority of advisory group members be private citizens and public interest group members who had no substantial economic interest in the grant activity. Some agencies indicated that they would be unable to locate many individuals without an economic interest in the grant acitivity who would be willing to serve on advisory groups. Some commenting agencies and public officials indicated that no single segment of the public should constitute a majority on the advisory group. Other commenting agencies and officials expressed approval of the changes in the advisory group requirements that had been made relative to the March concept papers—especially the increased emphasis on the role of public officials and the change allowing economic interests to be represented on advisory groups. Some of these commenters indicated that, with these changes, the advisory group membership requirements were satisfactory. Others indicated that the requirements were still too demanding and inflexible, stated that they could not meet them, and called for additional changes and increased flexibility.

A large majority of private citizen and public interest group commenters expressed approval of the advisory group membership requirements of proposed Part 25. Many of these commenters described their experiences indicating that non-economic interests were under-represented on advisory groups. These commenters supported carefully structured advisory group membership requirements, especially the proposed requirement for a majority of private citizens and public interest group members. Most of these commenters indicated that this measure would go far to remedy the problem of under representation for non-economic interests. However, some called upon EPA to require an even longer proportion of individuals who were interested in the grant supported activity solely from an environmental or taxpayer perspective.

EPA agrees that there must be flexibility in the requirements for advisory group membership. The final regulations require that the advisory group be composed of four segments in substantially equal proportion. These are private citizens, public interest group members, economic interests, and public officials. In response to commenters who requested EPA to explain the term "private citizen," the regulations indicate that this term refers to individuals with no greater interest in the grant activity than an average taxpayer, ratepayer, or consumer.

The provision that segments need be only "substantially equal" in proportion is intended to provide grantees with flexibility to implement the regulations while at the same time responding to those commenters who called upon EPA to carefully specify the balance of interests on the group. This language allows some imbalance among the categories of membership. For example, on a 20 person advisory group, the requirements would be met if two categories had only four members while the other two had six members. However, if one or more categories had only three members while others had six or seven, the requirement that the categories be in substantially equivalent proportions would not be met.

Many agency commenters expressed concern that they could not meet advisory group requirements because they could not locate private citizens or public interest group representatives who would be willing to serve on advisory groups. To respond to these commenters, the final regulations provide that grantees who have carried out an aggressive effort to recruit members to meet the requirements but cannot do so will be considered in compliance with the regulations. In a case such as this, EPA will approve the advisory group composition which has resulted from the grantee's recruitment efforts provided EPA is satisfied that those efforts meet the performance standard set forth in the regulations.

12. *Financial disclosure by advisory group members.* Many commenters indicated that a financial disclosure requirement would discourage participation of many prospective advisory group members. We agree, and accordingly we have deleted the financial disclosure requirements from the final regulations. We do, however, believe it is useful for advisory group members to know, in general, the type of interest which each member has in a plan or project under development. For example, individuals on the advisory group should indicate to one another whether they are representing environmental interests; economic interests such as agriculture, silvaculture, or real estate; recreational interests; consumer interests or others.

13. *Grantee and advisory group responsibilities.* Many commenters indicated the responsibilities of the advisory groups should be stated in detail in the final regulations. In support of this recommendation, these com-

menters cited examples of advisory groups that were formed but not utilized effectively. EPA does not believe it is proper to include a detailed discussion of the responsibilities of grantees and advisory groups in the regulations. it is, however, appropriate to expand somewhat upon the description of responsibilities and authorities included in the proposed regulations, and this has been done in the final regulations.

14. *Use of existing advisory groups to meet public participation requirements.* Some State and substate agencies which have established advisory groups, boards or commissions questioned whether these groups could be used to satisfy the advisory group requirements. EPA wishes to encourage coordination of public participation requirements and activities wherever possible. This is clearly stated in § 25.13, Coordination and nonduplication. Consistent with this, existing advisory groups may be used if they meet the requirements of § 25.7 or are modified to meet those requirements.

15. *Support for advisory group participation.* In the preamble to the proposed regulations, EPA questioned whether reimbursement of advisory group out-of-pocket expenses would be helpful in encouraging public participation and whether it would pose an administrative burden to grantees. Many comments were received on this issue as well as other matters pertaining to advisory group logistics, such as budget and staff for advisory groups. Many commenters indicated that reimbursement of out-of-pocket expenses would encourage participation. Several public interest groups suggested that citizens should be paid for the time they devote to advisory group participation; others urged a more cautious approach emphasizing volunteerism. Several commenting agencies indicated they already operate reimbursement programs for normal out-of-pocket expenses, but would be opposed to extending reimbursement to additional expenses such as payment for time expended in participation.

Since many agencies are already conducting reimbursement programs and since many commenters agree that reimbursement does encourage participation, EPA has determined that grantees shall make reasonable out-of-pocket costs of participation available to advisory group members. EPA will provide information on reimbursement systems to assist any agency which needs to establish a system.

Some commenters recommended that reimbursement be available only to private citizens and other advisory group members who do not represent economic interests. In fairness, we believe that reimbursement of reasonable out-of-pocket expenses should be available to all group members; however, we recognize that many advisory group members are eligible for reimbursement from the interests which they represent. In the interest of economy, we encourage those advisory group members to consider not requesting reimbursement from the grantee. In accord with OMB Circular 74-4, travel costs of elected officials are not currently eligible for reimbursement.

Many commenters indicated that advisory groups probably would be unable to carry out their responsibilities without their own staff and budget. Most agencies objected that requiring an independent staff for the advisory group conflicted with their status as advisors and could duplicate the efforts of the agency staff. Many agencies indicated that their staff was available to assist the advisory group where needed.

EPA recognizes the need for staff to assist advisory groups. But we agree that providing staff assistance should be the responsibility of the grantee. The final regulations require the grantee to inform the advisory group of staff available to assist it. The regulations also require the grantee to provide the advisory group with an operating budget which can be used to carry out their liaison with the general public and to assist the group in understanding the activity carried out under grant. The budget may be used for mailing, expert advice and other functions as agreed upon between the advisory groups and the grantee.

16. *Public participation program staff.* Many private citizens and public interest groups recommended that EPA require grantees to contract with local citizen groups to carry out public participation functions. Comments from agencies on the wisdom of this approach were mixed; however, agencies felt strongly that this decision should be discretionary. We agree, and, as a result, no such requirement appears in the final regulations. However, grantees are free to use this approach if they believe it will be the most effective in their situation.

Several commenters indicated that EPA should establish the qualifications of public participation staff in regulations. In general, we believe that the following characteristics will contribute to successful accomplishment of public participation responsibilities: familiarity with the affected area; knowledge of at least some of the parties likely to be interested or affected; experience in the skills needed to carry out a public participation program including organizing meetings, providing staff support to advisory groups, and other skills; and sufficient knowledge of the technical and procedural aspects of the grant activity to be able to explain them to the advisory group and other members of the public. EPA believes that these needed characteristics will be apparent to grantees. They will be stated in EPA guidance. However, we do not believe they should be specified in regulation. Accordingly, the final regulation does not specify the qualifications of public participation staff.

One State questioned whether the public participation staff contact for statewide activities could be located in the State agency office. The answer to this question is yes.

17. *Advisory group training.* A number of State and substate agencies indicated that EPA should conduct advisory group training in cooperation with the grantee. We agree, and the regulations have been modified to indicate that advisory group training should be carried out cooperatively by EPA, the State, and any applicable substate agency.

Several agencies commented that training should be provided for their staff as well as for advisory group members. Again we agree. The regulations indicate that agencies may include members of their staff in the training sessions for advisory group.

18. *Advisory group subcommittees and technical advisory groups.* Many commenting agencies questioned whether the advisory group requirements applied to other advisory bodies, such as groups of technical experts. Other agencies questioned whether subcommittees established by advisory groups need have the same composition as the primary advisory group. The regulations do not inhibit agencies from establishing technical panels or similar groups; however it is recommended that these groups be established as subcommittees of the primary advisory group or at least coordinated closely with that group. Any recommendations of technical groups should be reviewed by the primary advisory group, and any comments made by the advisory group should be forwarded to the grantee or decisionmaking officials along with the technical group's recommendations.

Several public interest group commenters indicated that any subcommittees should be required to have the same membership composition as the primary advisory group. EPA believes this would be unnecessarily restrictive. An agricultural subcommittee would logically be composed largely of individuals earning a living through farming, ranching, or related activities. A "severely affected parties" subcommittee might be composed almost entirely of individuals residing within a short distance of the proposed construction site. Even in cases where subcommittees have sharply focused areas of in-

terest, efforts should be made to include individuals who can express other, more general, points of view. Generally subcommittees should contain some members of the full advisory group, but not all subcommittee members need be members of the primary advisory group. Reimbursement need not be made available for subcommittee participation; although this may be done at the discretion of the responsible agency.

19. *Paperwork—Public participation work plans for grant activities.* The proposed regulations specified the information about planned public participation activities which should be included in grant applications. Comment on this section was generally favorable; although some agencies felt that the public participation work plans were not needed. Final Part 25 indicates the information which should be included in a public participation work plan. These plans should be brief. They are needed by EPA as a basis for award of funds for public participation activities.

The submission of this type of information with grant applications is not a new requirement. It is already required for the Construction Grants Program (under 40 CFR 35.917-5), for grant funded activities under the Resource Conservation and Recovery Act (under 40 CFR 249.5) and in the water Quality Management Program by guidance. The final regulation merely standardizes this requirement and emphasizes the brief nature of the required information.

Some agency commenters pointed out that there was no provision for revising the work plan. They expressed concern that this would place them in technical violation if they departed from the schedule in the work plan in even minor respects. We agree. Minor departures from the schedule would not be a violation of requirements. If more substantial changes are expected, the work plan should be revised. Provision for revision is included in the final regulations.

20. *Paperwork—Responsiveness Summaries (modified) and Public Participation Summaries (deleted).* Many commenters indicated that the proposed regulations, although an improvement over the concept papers, still failed to distinguish adequately between the use and content of Responsiveness Summaries and Public Participation Summaries. Some commenters expressed the opinion that the two requirements were duplicative. We agree, and we have eliminated Public Participation Summaries from the final regulation. The requirements for Responsiveness Summaries are more clearly stated.

Responsiveness Summaries are intended to appear immediately after specific decision points to indicate briefly to the public how decisionmakers have responded to their participation. They must be prepared for rulemaking and where required by program regulations or by an approved public participation work plan. Responsiveness Summaries were strongly endorsed by many commenters as a major step forward in fostering responsive government, public understanding of governmental decisions, and public confidence in government. In many instances where a Responsiveness Summary is required in program regulations, it replaces the existing public participation reporting requirements of Part 105.5 or Part 249.5.

Part 25 requires no new reports. Existing Part 105 calls for an annual public participation report by all agencies carrying out responsibilities under the Clean Water Act, including EPA Headquarters program offices and divisions, EPA regional offices, States and interstate agencies. All of these annual reporting requirements are eliminated by final Part 25.

Parts 105.5 and 249.5 contained requirements for reports associated with particular activities, such as the submission of applications for financial assistance and the submission of plans prepared with such assistance. All of these requirements are eliminated from the new Part 25. In some cases, the better defined, briefer, and more useful public participation work plans or Responsiveness Summaries will be required in program regulations at comparable activity points. The net reporting requirements are thereby reduced while making the remaining reports briefer and more sharply focused on important decisions.

21. *Assuring compliance with public participation requirements.* Many public interest group and private citizen commenters objected to the deletion from the proposed regulations of the description of optional sanctions which EPA could apply where the Regional Administrator determined that grantees had not carried out public participation requirements as reflected in their approved public participation work plans. Other commenters called for stronger mandatory action in instances of noncompliance. Many commenting agencies expressed concern that minor technical violations beyond the control of their agencies would be cause for action by EPA.

EPA deleted the descriptions of the optional sanctions in favor of references to the sections of the regulations which provide EPA authority to enforce grant agreements. The Agency believes that to state the full text of these sections in the public participation regulations would be redundant and unnecessary. However, for the sake of clarity and in order to be consistent with the practice followed elsewhere in final Part 25, the titles of the cited sections have been included in the regulation.

As indicated above, we have included provision for modifying the work plan to reflect major changes. Grantees may make minor departures from the work plan schedule at their discretion provided they do not infringe upon required periods of document availability or public notice.

We do not agree with those commenters who called for more stringent, mandatory sanctions. Accordingly, mandatory EPA action upon a finding of noncompliance remains the same as in the proposed regulations—more careful monitoring of future public participation performance.

Public Education and Assistance Under Resource Conservation and Recovery Act

Section 8003 of the Resource Conservation and Recovery Act requires EPA to develop information on a comprehensive list of topics pertaining to environmental protection through solid waste management. Interim final 40 CFR Part 249.4(c) indicated that EPA would assist State and substate agencies in carrying out their public information and education responsibilities under the Resource Conservation and Recovery Act by making these agencies among the first recipients of information developed by EPA to meet the requirements of section 8003. Although interim final Part 249 will be deleted from the *Code of Federal Regulations* with the promulgation of the new Part 25, EPA will meet the commitment, stated in Part 249.4(c), to assist State agencies by providing them with informational materials.

Section 249.4(c) also indicated that each EPA Regional Office would designate a public participation officer to coordinate public participation activities relating to solid waste management within EPA and to assist State and substate agencies with their public participation responsibilities under the Resource Conservation and Recovery Act. The requirement to designate regional public participation officers and the commitment to assist other agencies with their public participation programs remains in effect although Part 249 will be deleted from the *Code of Federal Regulations.*

Agency Evaluation and "Sunset" Policy for Reporting Requirements

EPA is committed to evaluating this regulation within three years from the date of publication. This will be done by the Office of Water and Waste Management in conjunction with the Office of Public Awareness and the Administrator's Public Participation

Task Force. The evaluation will include such factors as effectiveness of requirements, enforceability, resource expenditure, alternative public participation methods, public reaction, and reporting requirements. The evaluation will also address the issue of whether the increased flexibility introduced into the regulations has had a positive or a negative effect on public participation performance.

Under EPA's new "sunset" policy for reporting requirements in regulations, the reporting requirements in this regulation will automatically expire on (five years from the date of promulgation) unless EPA takes action to extend them. A new provision (§ 25.14) has been added to the regulation which automatically terminates the reporting requirements at that time.

REVISION OF PROGRAM REGULATIONS FOR CONSISTENCY WITH PART 25

The following paragraphs identify specific program regulations which have been or will be revised to bring them into conformance with Part 25.

CLEAN WATER ACT

1. Amendments to Municipal Wastewater Treatment Works Construction Grants Program regulations (40 CFR Part 35, Subpart E) which implement the requirements of Part 25 are promulgated in this issue of the FEDERAL REGISTER.

2. Revised regulations (40 CFR Part 35, Subpart G) implementing water quality planning and management under sections 106 and 208, and reflecting the provisions of proposed Part 25 were published in the FEDERAL REGISTER for comment on September 12, 1978. The final regulations, including changes made in response to public comment and revisions to Part 25, will be promulgated early in 1979.

3. Revised regulations implementing the National Pollutant Discharge Elimination System Permit Program requirements of section 402, and reflecting the provisions of proposed Part 25, were published for comment on August 21, 1978. The final regulations, including changes made in response to public comment and the revisions to proposed Part 25, will be promulgated early in 1979.

4. Regulations implementing the Clean Lakes Program under section 314 and reflecting the provisions of Part 25 will be proposed in February 1979. EPA will accept public comment on the proposed regulations for 60 days following the proposal date. Those wishing to receive additional information or a copy of the proposed regulations should write to Kenneth Mackenthun, Director, Criteria and Standards Division (WH 585), United States Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

RESOURCE CONSERVATION AND RECOVERY ACT

1. State Solid Waste Management Plan Guidelines (40 CFR Part 256) under section 4002(b) were proposed for comments on August 28, 1978. The proposed regulations included provisions implementing the requirements of proposed Part 25. EPA will revise the proposed regulations to respond to public comments and changes in Part 25 and promulgate final regulations in June 1979.

2. Regulations for State Programs for Hazardous Waste under section 3006 were proposed for comment on February 1, 1978. EPA will revise these regulations in response to public comment and the requirements of Part 25, repropose them in early 1979, and provide 60 days for public comment. Those who wish to receive additional information or a copy of the proposed regulations should contact Geraldine Wyer, Office of Solid Waste (WH 562), United States Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

3. Regulations for Permit Programs for Hazardous Waste under section 3005 will be proposed in February 1979. EPA will accept public comment on the regulation for 60 days following the date of proposal. The proposed regulations will reflect the provisions of Part 25. Those who wish to receive additional information or a copy of the regulations should contact Geraldine Wyer, Office of Solid Waste (WH 562), United States Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

SAFE DRINKING WATER ACT

1. Regulations for grants to States for implementing Underground Water Source Protection Programs (40 CFR Part 35.650 through 35.680) were proposed for comment on August 31, 1976. Final regulations, reflecting public comment and the provisions of Part 25, will be promulgated in 1979.

NOTE.—The Environmental Protection Agency has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Analysis Statement under Executive Orders 11821, 11949, and 12044 and OMB circular A-107.

Dated: February 8, 1979.

DOUGLAS M. COSTLE,
Administrator.

(Sec. 101(e) of the Clean Water Act, as amended, 33 U.S.C. 1251(e); section 7004(b) of the Resource Conservation and Recovery Act, 42 U.S.C. 6974(b); sec. 1450(a)(1) of the Safe Drinking Water Act, as amended, 42 U.S.C. 300j9.)

1. 40 CFR is amended by adding a new Part 25 reading as follows:

PART 25—PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Sec.
25.1 Introduction.
25.2 Scope.
25.3 Policy and objectives.
25.4 Information, notification and consultation responsibilities.
25.5 Public hearings.
25.6 Public meetings.
25.7 Advisory groups.
25.8 Responsiveness summaries.
25.9 Permit enforcement.
25.10 Rulemaking.
25.11 Work elements in financial assistance agreements.
25.12 Assuring compliance with public participation requirements.
25.13 Coordination and non-duplication.
25.14 Termination of reporting requirements.

AUTHORITY: Sec. 101(e) of the Clean Water Act, as amended, 33 U.S.C. 1251(e); sec. 7004(b) of the Resource Conservation and Recovery Act, 42 U.S.C. 6974(b); sec. 1450(a)(1) of the Safe Drinking Water Act, as amended, 42 U.S.C. 300j9.

§ 25.1 Introduction.

This part sets forth minimum requirements and suggested program elements for public participation in activities under the Clean Water Act (Pub. L. 95-217), the Resource Conservation and Recovery Act (Pub. L. 94-580), and the Safe Drinking Water Act (Pub. L. 93-523). The applicability of the requirements of this part is as follows:

(a) Basic requirements and suggested program elements for public information, public notification, and public consultation are set forth in § 25.4. These requirements are intended to foster public awareness and open processes of government decisionmaking. They are applicable to all covered activities and programs described in § 25.2(a).

(b) Requirements and suggested program elements which govern the structure of particular public participation mechanisms (for example, advisory groups and responsiveness summaries) are set forth in §§ 25.5, 25.6, 25.7, and 25.8. This part does not mandate the use of these public participation mechanisms. It does, however, set requirements which those responsible for implementing the mechanisms must follow if the mechanisms are required elsewhere in this chapter.

(c) Requirements which apply to Federal financial assistance programs (grants and cooperative agreements) under the three acts are set forth in §§ 25.10 and 25.12(a).

(d) Requirements for public involvement which apply to specific activities are set forth in § 25.9 (Permit enforcement), § 25.10 (Rulemaking), and § 25.12 (Assuring compliance with requirements).

§ 25.2 Scope.

(a) The activities under the three Acts which are covered by this part are:

(1) EPA rulemaking, except nonpolicy rulemaking (for example publication of funding allotments under statutory formulas); and State rulemaking under the Clean Water Act and Resource Conservation and Recovery Act;

(2) EPA issuance and modification of permits, and enforcement of permits as delineated by § 25.9;

(3) Development by EPA of major informational materials, such as citizen guides or handbooks, which are expected to be used over several years and which are intended to be widely distributed to the public;

(4) Development by EPA of strategy and policy guidance memoranda when a Deputy Assistant Administrator determines it to be appropriate;

(5) Development and implementation of plans, programs, standards, construction, and other activities supported with EPA financial assistance (grants and cooperative agreements) to State, interstate, regional and local agencies (herein after referred to as "State, interstate, and substate agencies");

(6) The process by which EPA makes a determination regarding approval of State administration of the Construction Grants program in lieu of Federal administration; and the administration of the Construction Grants Program by the State after EPA approval;

(7) The process by which EPA makes a determination regarding approval of State administration of the following programs in lieu of Federal administration: The State Hazardous Waste Program; the NPDES Permit Program; the Dredge and Fill Permit Program; and the Underground Injection Control Program;

(8) Other activities which the Assistant Administrator for Water and Waste Management, the Assistant Administrator for Enforcement, or any EPA Regional Administrator deems appropriate in view of the Agency's responsibility to involve the public in significant decisions.

(b) Activities which are not covered by this part, except as otherwise provided under (a)(8) or (c) of this section, are activities under Parts 33 (Subagreements), 39 (Loan Guarantees for Construction of Treatment Works), 40 (Research and Development Grants), 45 (Training Grants and Manpower Forecasting) and 46 (Fellowships) of this chapter.

(c) Some programs covered by these regulations contain further provisions concerning public participation. These are found elsewhere in this chapter in provisions which apply to the program of interest. Regulations which govern the use and release of public information are set forth in part 2 of this chapter.

(d) Specific provisions of court orders which conflict with requirements of this part, such as court-established timetables, shall take precedence over the provisions in this Part.

(e) Where the State undertakes functions in the construction grants program, the State shall be responsible for meeting these requirements for public participation, and any applicable public participation requirements found elsewhere in this chapter, to the same extent as EPA.

(f) Where the State undertakes functions in those programs specifically cited in § 25.2(a)(7), the State shall be responsible for meeting the requirements for public participation included in the applicable regulations governing those State programs. The requirements for public participation in State Hazardous Waste Programs, Dredge and Fill Permit programs, Underground Injection Control programs and NPDES permit programs are found in Part 123 of this chapter. These regulations embody the substantive requirements of this part.

(g) These regulations apply to the activities of all agencies receiving EPA financial assistance which is awarded after [the effective date of final regulations], and to all other covered activities of EPA, State, interstate, and substate agencies which occur after that date. These regulations will apply to ongoing grants or other covered activities upon any significant change in the activity (for example, upon a significant proposed increase in project scope of a construction grant). Parts 105 (Public Participation in Water Pollution Control) and 249 (Public Participation in Solid Waste Management) will no longer appear in the Code of Federal Regulations; however, they will remain applicable, in uncodified form, to grants awarded prior to the effective date of this part and to all other ongoing activities.

§ 25.3 Policy and objectives.

(a) EPA, State, interstate, and substate agencies carrying out activities described in § 25.2(a) shall provide for, encourage, and assist the participation of the public. The term, "the public" in the broadest sense means the people as a whole, the general populace. There are a number of identifiable "segments of the public" which may have a particular interest in a given program or decision. Interested and affected segments of the public may be affected directly by a decision, either beneficially or adversely; they may be affected indirectly; or they may have some other concern about the decision. In addition to private citizens, the public may include, among others, representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations.

(b) Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official. Disagreement on significant issues is to be expected among government agencies and the diverse groups interested in and affected by public policy decisions. Public agencies should encourage full presentation of issues at an early stage so that they can be resolved and timely decisions can be made. In the course of this process, responsible officials should make special efforts to encourage and assist participation by citizens representing themselves and by others whose resources and access to decision-making may be relatively limited.

(c) The following are the objectives of EPA, State, interstate, and substate agencies in carrying out activities covered by this part:

(1) To assure that the public has the opportunity to understand official programs and proposed actions, and that the government fully considers the public's concerns;

(2) To assure that the government does not make any significant decision on any activity covered by this part without consulting interested and affected segments of the public;

(3) To assure that government action is as responsive as possible to public concerns;

(4) To encourage public involvement in implementing environmental laws;

(5) To keep the public informed about significant issues and proposed project or program changes as they arise;

(6) To foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public; and

(7) To use all feasible means to create opportunities for public partici-

pation, and to stimulate and support participation.

§ 25.4 Information, notification, and consultation responsibilities.

(a) *General.* EPA, State, interstate, and substate agencies shall conduct a continuing program for public information and participation in the development and implementation of activities covered by this part. This program shall meet the following requirements:

(b) *Information and assistance requirements.* (1) Providing information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and facilitate the public's participation in all significant decisions covered by § 25.2(a), particularly where alternative courses of action are proposed.

(2) Each agency shall provide the public with continuing policy, program, and technical information and assistance beginning at the earliest practicable time. Informational materials shall highlight significant issues that will be the subject of decisionmaking. Whenever possible, consistent with applicable statutory requirements, the social, economic, and environmental consequences of proposed decisions shall be clearly stated in such material. Each agency shall identify segments of the public likely to be affected by agency decisions and should consider targeting informational materials toward them (in addition to the materials directed toward the general public). Lengthy documents and complex technical materials that relate to significant decisions should be summarized for public and media uses. Fact sheets, news releases, newsletters, and other similar publications may be used to provide notice that materials are available and to facilitate public understanding of more complex documents, but shall not be a substitute for public access to the full documents.

(3) Each agency shall provide one or more central collections of reports, studies, plans, and other documents relating to controversial issues or significant decisions in a convenient location or locations, for example, in public libraries. Examples of such documents are catalogs of documents available from the agency, grant applications, fact sheets on permits and permit applications, permits, effluent discharge information, and compliance schedule reports. Copying facilities at reasonable cost should be available at the depositories.

(4) Whenever possible, agencies shall provide copies of documents of interest to the public free of charge. Charges for copies should not exceed prevailing commercial copying costs. EPA requirements governing charges for information and documents provided to the public in response to requests made under the Freedom of Information Act are set forth in Part 2 of this chapter. Consistent with the objectives of § 25.3(b), agencies may reserve their supply of free copies for private citizens and others whose resources are limited.

(5) Each agency shall develop and maintain a list of persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity. Generally, this list will be most useful where subdivided by area of interest or geographic area. Whenever possible, the list should include representatives of the several categories of interests listed under § 25.3(a). Those on the list, or relevant portions if the list is subdivided, shall receive timely and periodic notification of the availability of materials under § 25.4(b)(2).

(c) *Public notification.* Each agency shall notify interested and affected parties, including appropriate portions of the list required by paragraph (b)(5) of this section, and the media in advance of times at which major decisions not covered by notice requirements for public meetings or public hearings are being considered. Generally, notices should include the timetable in which a decision will be reached, the issues under consideration, any alternative courses of action or tentative determinations which the agency has made, a brief listing of the applicable laws or regulations, the location where relevant documents may be reviewed or obtained, identification of any associated public participation opportunities such as workshops or meetings, the name of an individual to contact for additional information, and any other appropriate information. All advance notifications under this paragraph must be provided far enough in advance of agency action to permit time for public response; generally this should not be less than 30 days.

(d) *Public consultation.* For the purposes of this part, "public consultation" means an exchange of veiws between governmental agencies and interested or affected persons and organizations in order to meet the objectives set forth in § 25.3. Requirements for three common forms of public consultation (public hearings, public meetings, and advisory groups) are set forth in §§ 25.5, 25.6, and 25.7. Other less formal consultation mechanisms may include but are not limited to review groups, ad hoc committees, task forces, workshops, seminars and informal personal communications with individuals and groups. Public consultation must be preceded by timely distribution of information and must occur sufficiently in advance of decisionmaking to allow the agency to assimilate public views into agency action. EPA, State, interstate, and substate agencies shall provide for early and continuing public consultation in any siginificant action covered by this part. Merely conferring with the public after an agency decision does not meet this requirement. In addition to holding hearings and meetings as specifically required in this chapter, a hearing or meeting shall be held if EPA, the State, interstate, or substate agency determines that there is significant public interest or that a hearing or meeting would be useful.

(e) *Public information concerning legal proceedings.* EPA, State, interstate, and substate agencies shall provide full and open information on legal proceedings to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation. EPA actions with regard to affording opportunities for public comment before the Department of Justice consents to a proposed judgment in an action to enjoin discharges of pollutants into the environment shall be consistent with the Statement of Policy issued by the Department of Justice (see Title 28, Code of Federal Regulations, Chapter 1, § 50.7).

§ 25.5 Public hearings.

(a) *Applicability.* Any non-adjudicatory public hearing, whether mandatory or discretionary, under the three Acts shall meet the following minimum requirements. These requirements are subordinate to any more stringent requirements found elsewhere in this chapter or otherwise imposed by EPA, State, interstate, or substate agencies. Procedures developed for adjudicatory hearings required by this chapter shall be consistent with the public participation objectives of this part, to the extent practicable.

(b) *Notice.* A notice of each hearing shall be well publicized, and shall also be mailed to the appropriate portions of the list of interested and affected parties required by § 25.4(b)(5). Except as otherwise specifically provided elsewhere in this chapter, these actions must occur at least 45 days prior to the date of the hearing. However, where EPA determines that there are no substantial documents which must be reviewed for effective hearing participation and that there are no complex or controversial matters to be addressed by the hearing, the notice requirement may be reduced to no less than 30 days. EPA may further reduce or waive the hearing notice requirement in emergency situations where EPA determines that there is an imminent danger to public health. To the

extent not duplicative, the agency holding the hearing shall also provide informal notice to all interested persons or organizations that request it. The notice shall identify the matters to be discussed at the hearing and shall include or be accompanied by a discussion of the agency's tentative determination on major issues (if any), information on the availability of a bibliography of relevant materials (if deemed appropriate), and procedures for obtaining further information. Reports, documents and data relevant to the discussion at the public hearing shall be available to the public at least 30 days before the hearing. Earlier availability of materials relevant to the hearing will further assist public participation and is encouraged where possible.

(c) *Locations and time.* Hearings must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public. Accessibility of public transportation, and use of evening and weekend hearings, should be considered. In the case of actions with Statewide interest, holding more than one hearing should be considered.

(d) *Scheduling presentations.* The agency holding the hearing shall schedule witnesses in advance, when necessary, to ensure maximum participation and allotment of adequate time for all speakers. However, the agency shall reserve some time for unscheduled testimony and may consider reserving blocks of time for major categories of witnesses.

(e) *Conduct of hearing.* The agency holding the hearing shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public. The agency should consider allowing a question and answer period. Procedures shall not unduly inhibit free expression of views (for example, by onerous written statement requirements or qualification of witnesses beyond minimum identification).

(f) *Record.* The agency holding the hearing shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it. A copy of the record shall be available for public review.

§ 25.6 Public meetings.

Public meetings are any assemblies or gathering, (such as conferences, informational sessions, seminars, workshops, or other activities) which the responsible agency intends to be open to anyone wishing to attend. Public meetings are less formal than public hearings. They do not require formal presentations, scheduling of presentations and a record of proceedings. The requirements of § 25.5 (b) and (c) are applicable to public meetings, except that the agency holding the meeting may reduce the notice to not less than 30 days if there is good reason that longer notice cannot be provided.

§ 25.7 Advisory groups.

(a) *Applicability.* The requirements of this section on advisory groups shall be met whenever provisions of this chapter require use of an advisory group by State, interstate, or substate agencies involved in activities supported by EPA financial assistance under any of the three Acts.

(b) *Role.* Primary responsibility for decision-making in environmental programs is vested by law in the elected and appointed officials who serve on public bodies and agencies at various levels of government. However, all segments of the public must have the opportunity to participate in environmental quality planning. Accordingly, where EPA identifies a need for continued attention of an informed core group of citizens in relation to activities conducted with EPA financial assistance, program regulations elsewhere in this chapter will require an advisory group to be appointed by the financially assisted agency. Such advisory groups will not be the sole mechanism for public participation, but will complement other mechanisms. They are intended to assist elected or appointed officials with final decision-making responsibility by making recommendations to such officials on important issues. In addition, advisory groups should foster a constructive interchange among the various interests present on the group and enhance the prospect of community acceptance of agency action.

(c) *Membership.* (1) The agency receiving financial assistance shall assure that the advisory group reflects a balance of interests in the affected area. In order to meet this requirement, the assisted agency shall take positive action, in accordance with paragraph (c)(3), to establish an advisory group which consists of substantially equivalent proportions of the following four groups:

(i) *Private citizens.* No person may be included in this portion of the advisory group who is likely to incur a financial gain or loss greater than that of an average homeowner, taxpayer or consumer as a result of any action likely to be taken by the assisted agency.

(ii) *Representatives of public interest groups.* A "public interest group" is an organization which reflects a general civic, social, recreational, environmental or public health perspective in the area and which does not directly reflect the economic interests of its membership.

(iii) Public officials.

(iv) Citizens or representatives of organizations with substantial economic interests in the plan or project.

(2) Generally, where the activity has a particular geographic focus, the advisory group shall be made up of persons who are residents of that geographic area.

(3) In order to meet the advisory group membership requirements of paragraph (c)(1), the assisted agency shall:

(i) Identify public interest groups, economic interests, and public officials who are interested in or affected by the assisted activity.

(ii) Make active efforts to inform citizens in the affected area, and the persons or groups identified under paragraph (c)(3)(i), of this opportunity for participation on the advisory group. This may include such actions as placing notices or announcements in the newspapers or other media, mailing written notices to interested parties, contacting organizations or individuals directly, requesting organizations to notify their members through meetings, newsletters, or other means.

(iii) Where the membership composition set forth in paragraph (c)(1) is not met after the above actions, the assisted agency shall identify the causative problems and make additional efforts to overcome such problems. For example, the agency should make personal contact with prospective participants to invite their participation.

(iv) Where problems in meeting the membership composition arise, the agency should request advice and assistance from EPA.

(d) The assisted agency shall record the names and mailing addresses of each member of the advisory group, with the attributes of each in relation to the membership requirements set forth in paragraph (c)(1), provide a copy to EPA, and make the list available to the public. In the event that the membership requirements set forth in paragraph (c)(1) are not met, the assisted agency shall append to the list a description of its efforts to comply with those requirements and an explanation of the problems which prevented compliance. EPA shall review the agency's efforts to comply and approve the advisory group composition or, if the agency's efforts were inadequate, require additional actions to achieve the required membership composition.

(e) *Responsibilities of the assisted agency.* (1) The assisted agency shall designate a staff contact who will be responsible for day-to-day coordination among the advisory group, the

agency, and any agency contractors or consultants. The financial assistance agreement shall include a budget item for this staff contact. Where substantial portions of the assisted agency's responsibilities will be met under contract, the agency shall require a similar designation, and budget specification, of its contractor. In the latter event, the assisted agency does not have to designate a separate staff contact on its own staff, if the Regional Administrator determines that the contractor's designation will result in adequate coordination. The staff contact shall be located in the project area.

(2) The assisted agency has such responsibilities as providing the advisory group with information, identifying issues for the advisory group's consideration, consulting with the advisory group throughout the project, requesting the advisory group's recommendations prior to major decisions, transmitting advisory group recommendations to decision-making officials, and making written responses to any formal recommendation by the advisory group. The agency shall make any such written responses available to the public. To the maximum extent feasible, the assisted agency shall involve the advisory group in the development of the public participation program.

(3) The assisted agency shall identify professional and clerical staff time which the advisory group may depend upon for assistance, and provide the advisory group with an operating budget which may be used for technical assistance and other purposes agreed upon between the advisory group and the agency.

(4) The assisted agency shall establish a system to make costs of reasonable out-of-pocket expenses of advisory group participation available to group members. Time away from work need not be reimbursed; however, assisted agencies are encouraged to schedule meetings at times and places which will not require members to leave their jobs to attend.

(f) *Advisory group responsibilities and duties.* The advisory group may select its own chairperson, adopt its own rules of order, and schedule and conduct its own meetings. Advisory group meetings shall be announced well in advance and shall be open to the public. At all meetings, the advisory group shall provide opportunity for public comment. Any minutes of advisory group meetings and recommendations to the assisted agency shall be available to the public. The advisory group should monitor the progress of the project and become familiar with issues relevant to project development. In the event the assisted agency and the advisory group agree that the advisory group will assume public participation responsibilities, the group should undertake those responsibilities promptly. The advisory group should make written recommendations directly to the assisted agency and to responsible decision-making officials on major decisions (including approval of the public participation program) and respond to any requests from the agency or decision-making officials for recommendations. The advisory group should remain aware of community attitudes and responses to issues as they arise. As part of this effort, the advisory group may, within the limitations of available resources, conduct public participation activities in conjunction with the assisted agency; solicit outside advice; and establish, in conjunction with the assisted agency, subcommittees, ad hoc groups, or task forces to investigate and develop recommendations on particular issues as they arise. The advisory group should undertake its responsibilities fully and promptly in accordance with the policies and requirements of this part. Nothing shall preclude the right of the advisory group from requesting EPA to perform an evaluation of the assisted agency's compliance with the requirements of this part.

(g) *Training and assistance.* EPA will promptly provide appropriate written guidance and project information to the newly formed advisory group and may provide advice and assistance to the group throughout the life of the project. EPA will develop and, in conjunction with the State or assisted agency, carry out a program to provide a training session for the advisory group, and appropriate assisted agency representatives, promptly after the advisory group is formed. The assisted agency shall provide additional needed information or assistance to the advisory group.

§ 25.8 Responsiveness summaries.

Each agency which conducts any activities required under this part shall prepare a Responsiveness Summary at specific decision points as specified in program regulations or in the approved public participation work plan. Responsiveness Summaries are also required for rulemaking activities under § 25.10. Each Responsiveness Summary shall identify the public participation activity conducted; describe the matters on which the public was consulted; summarize the public's views, significant comments, criticisms and suggestions; and set forth the agency's specific responses in terms of modifications of the proposed action or an explanation for rejection of proposals made by the public. Responsiveness Summaries prepared by agencies receiving EPA financial assistance shall also include evaluations by the agency of the effectiveness of the public participation program. Assisted agencies shall request such evaluations from any advisory group and provide an opportunity for other participating members of the public to contribute to the evaluation. (In the case of programs with multiple responsiveness summary requirements, these analyses need only be prepared and submitted with the final summary required.) Responsiveness summaries shall be forwarded to the appropriate decision-making official and shall be made available to the public. Responsiveness Summaries shall be used as part of evaluations required under this part or elsewhere in this chapter.

§ 25.9 Permit enforcement.

Each agency administering a permit program shall develop internal procedures for receiving evidence submitted by citizens about permit violations and ensuring that it is properly considered. Public effort in reporting violations shall be encouraged, and the agency shall make available information on reporting procedures. The agency shall investigate alleged violations promptly.

§ 25.10 Rulemaking.

(a) EPA shall invite and consider written comments on proposed and interim regulations from any interested or affected persons and organizations. All such comments shall be part of the public record, and a copy of each comment shall be available for public inspection. EPA will maintain a docket of comments received and any Agency responses. Notices of proposed and interim rulemaking, as well as final rules and regulations, shall be distributed in accordance with § 25.4(c) to interested or affected persons promptly after publication. Each notice shall include information as to the availability of the full texts of rules and regulations (where these are not set forth in the notice itself) and places where copying facilities are available at reasonable cost to the public. Under Executive Order 12044 (March 23, 1978), further EPA guidance will be issued concerning public participation in EPA rulemaking. A Responsiveness Summary shall be published as part of the preamble to interim and final regulations. In addition to providing opportunity for written comments on proposed and interim regulations, EPA may choose to hold a public hearing.

(b) State rulemaking specified in § 25.2(a)(1) shall be in accord with the requirements of subparagraph (a) of this paragraph or with the State's administrative procedures act, if one exists. However, in the event of conflict between a provision of paragraph (a) and a provision of a State's administrative procedures act, the State's law shall apply.

§ 25.11 Work elements in financial assistance agreements.

(a) This section is applicable to activities under § 25.2(a)(5) except as otherwise provided in Parts 30 or 35.

(b) Each applicant for EPA financial assistance shall set forth in the application a public participation work plan or work element which reflects how public participation will be provided for, encouraged, and assisted in accordance with this part. This work plan or element shall cover the project period. At a minimum, the work plan or element shall include:

(1) Staff contacts and budget resources to be devoted to public participation by category;

(2) A proposed schedule for public participation activities to impact major decisions, including consultation points where responsiveness summaries will be prepared;

(3) An identification of consultation and information mechanisms to be used;

(4) The segments of the public targeted for involvement.

(c) All reasonable costs of public participation incurred by assisted agencies which are identified in an approved public participation work plan or element, or which are otherwise approved by EPA, shall be eligible for financial assistance.

(d) The work plan or element may be revised as necessary throughout the project period with approval of the Regional Administrator.

§ 25.12 Assuring compliance with public participation requirements.

(a) *Financial assistance programs.* (1) *Applications.* EPA shall review the public participation work plan (or, if no work plan is required by this chapter for the particular financial assistance agreement, the public participation element) included in the application to determine consistency with all policies and requirements of this part. No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements of this part and, any applicable public participation requirements found elsewhere in this chapter, will be met.

(2) *Compliance.* (i) *Evaluation.* EPA shall evaluate compliance with public participation requirements using the work plan, responsiveness summary, and other available information. EPA will judge the adequacy of the public participation effort in relation to the objectives and requirements of § 25.3 and § 25.4 and other applicable requirements. In conducting this evaluation, EPA may request additional information from the assisted agency, including records of hearings and meetings, and may invite public comment on the agency's performance. The evaluation will be undertaken as part of any mid-project review required in various programs under this chapter; where no such review is required the review shall be conducted at an approximate mid-point in continuing EPA oversight activity. EPA may, however, undertake such evaluation at any point in the project period, and will do so whenever it believes that an assisted agency may have failed to meet public participation requirements.

(ii) *Remedial actions.* Whenever EPA determines that an assisted agency has not fully met public participation requirements, EPA shall take actions which it deems appropriate to mitigate the adverse effects of the failure and assure that the failure is not repeated. For ongoing projects, that action shall include, at a minimum, imposing more stringent requirements on the assisted agency for the next budget period or other period of the project (including such actions as more specific output requirements and milestone schedules for output achievement; interim EPA review of public participation activities and materials prepared by the agency, and phased release of funds based on compliance with milestone schedules.) EPA may terminate or suspend part or all financial assistance for non-compliance with public participation requirements, and may take any further actions that it determines to be appropriate in accordance with Parts 30 and 35 of this chapter (see, in particular, §§ 30.340, Noncompliance and 30.615-3, Withholding of Payments, and Subpart H of Part 30, Modification, Suspension, and Termination).

(b) *State programs approved in lieu of Federal programs.* State compliance with applicable public participation requirements in programs specified in sections 25.2(a) (6) and (7) and administered by approved States shall be monitored by EPA during the annual review of the State's program, and during any financial or program audit or review of these programs. EPA may withdraw an approved program from a State for failure to comply with applicable public participation requirements.

(c) *Other covered programs.* Assuring compliance with these public participation requirements for programs not covered by paragraphs (a) and (b) of this section is the responsibility of the Administrator of EPA. Citizens with information concerning alleged failures to comply with the public participation requirements should notify the Administrator. The Administrator will assure that instances of alleged noncompliance are promptly investigated and that corrective action is taken where necessary.

§ 25.13 Coordination and non-duplication.

The public participation activities and materials that are required under this part should be coordinated or combined with those of closely related programs or activities wherever this will enhance the economy, the effectiveness, or the timeliness of the effort; enhance the clarity of the issue; and not be detrimental to participation by the widest possible public. Hearings and meetings on the same matter may be held jointly by more than one agency where this does not conflict with the policy of this paragraph. Special efforts shall be made to coordinate public participation procedures under this part and applicable regulations elsewhere in this chapter with environmental assessment and analysis procedures under 40 CFR Part 6. EPA encourages interstate agencies in particular to develop combined proceedings for the States concerned.

§ 25.14 Termination of reporting requirements.

All reporting requirements specifically established by this part will terminate on (5 years from date of publication) unless EPA acts to extend the requirements beyond that date.

PART 105 [REVOKED]

PART 249 [REVOKED]

2. 40 CFR is amended by deleting Parts 105 and 249.

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